247 N.C. App.—No. 3 Pages 401-479

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 17, 2018

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OF
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COURT OF APPEALS

CASES REPORTED

FILED 10 MAY 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Appeal and Error—improper personal feelings—issue not addressed—not likely to happen at retrial—Although defendant asserted that the trial court erred during sentencing by allegedly making comments demonstrating that it improperly considered certain personal feelings when sentencing defendant, the issue was not addressed. The case was reversed and remanded for a new trial, and the trial court was not likely to repeat the comments. **State v. Holloman, 434.**

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CHURCHES AND RELIGION

Churches and Religion—breach of contract—North Carolina Wage and Hour Act—ministerial exception—ecclesiastical abstention doctrine—The trial court erred by granting defendants' motion to dismiss for failure to state a claim upon which relief can be granted on claims by a former pastor for both breach of contract and violation of the North Carolina Wage and Hour Act. The "ministerial exception" and the "ecclesiastical abstention doctrine" does not bar courts from resolving contractual disputes not involving ecclesiastical issues and requiring only application of neutral principles of contract and statutory law. **Bigelow v. Sassafras Grove Baptist Church, 401.**

SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

BIGELOW v. SASSAFRAS GROVE BAPTIST CHURCH

[247 N.C. App. 401 (2016)]

REV. CARL E. BIGELOW, PLAINTIFF
v.
SASSAFRAS GROVE BAPTIST CHURCH, BOARD OF DEACONS OF SASSAFRAS GROVE BAPTIST CHURCH, WILLIE L. TURNER, JAMES HINTON, LOUIS HENDERSON, BOBBY R. JONES, ROY JOHNSON, SELMA S. HUNTER, CINDY HENDERSON, REV. DAVID HOLLOWAY, AND JOHN DOES, DEFENDANTS

No. COA15-557

Filed 10 May 2016

1. Employer and Employee—breach of contract—North Carolina Wage and Hour Act—at will doctrine

Plaintiff adequately stated claims for breach of contract and violation of the North Carolina Wage and Hour Act. The "at will" doctrine does not preclude an at will employee from suing for breach of contract with respect to benefits or compensation to which the parties contractually agreed. Further, plaintiffs sufficiently alleged that the contractually promised salary constituted wages and that defendant wrongfully failed to pay that salary.

2. Churches and Religion—breach of contract—North Carolina Wage and Hour Act—ministerial exception—ecclesiastical abstention doctrine

The trial court erred by granting defendants' motion to dismiss for failure to state a claim upon which relief can be granted on claims by a former pastor for both breach of contract and violation of the North Carolina Wage and Hour Act. The "ministerial exception" and the "ecclesiastical abstention doctrine" does not bar courts from resolving contractual disputes not involving ecclesiastical issues and requiring only application of neutral principles of contract and statutory law.

Appeal by plaintiff from order entered 20 January 2015 by Judge W. Osmond Smith, III in Caswell County Superior Court. Heard in the Court of Appeals 4 November 2015.

Hicks McDonald Noecker LLP, by David W. McDonald, for plaintiff-appellant.

Law Offices of R. Lee Farmer, PLLC, by R. Lee Farmer, for defendants-appellees.

GEER, Judge.

Plaintiff, the Reverend Carl E. Bigelow, appeals from an order granting defendants' motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiff, a former pastor of defendant Sassafras Grove Baptist Church ("the "Church") who became disabled, has brought claims for both breach of contract and violation of the North Carolina Wage and Hour Act for failure to pay compensation and benefits plaintiff alleges is due to him pursuant to a written employment contract he entered into with defendants. While defendants have argued that two overlapping doctrines emanating from the First Amendment, the "ministerial exception" and the "ecclesiastical abstention doctrine," preclude the courts from deciding plaintiff's claims, we hold, consistent with other jurisdictions addressing this issue, that those doctrines do not bar courts from resolving contractual disputes not involving ecclesiastical issues and requiring only application of neutral principles of contract and statutory law. We, therefore, reverse the trial court's order.

Facts

On 25 October 2013, plaintiff filed a complaint against defendants -- the Church and its Board of Deacons, including Willie Turner, James Hinton, Louis Henderson, Bobby Jones, Roy Johnson, Selma Hunter, Cindy Henderson, and the Revered David Holloway -- for breach of contract and violation of the North Carolina Wage and Hour Act. The complaint alleged the following facts.

Plaintiff began serving as a part-time pastor of "the Church," which is located in Yanceyville, North Carolina, in 1975. He held this part-time position until 14 February 2001, during which time he also worked for General Electric Co. ("GE") in Mebane, North Carolina. In order to be eligible for retirement at GE, plaintiff was required to continue working there through 13 February 2013. However, on 14 February 2001, plaintiff resigned his position with GE and entered into a contract with the Church entitled "Agreement of Full Time Pastorship." This contract consisted of several provisions that are pertinent to this appeal:

> The Pastor shall serve the church for an indefinite period since there is no scriptural support of tenure. Where as, by [sic] Minister CARL BIGELOW is resigning from his current position of employment and would be eligible for retirement in the next (12) years, the [sic] accepts the liability of his employment and livelihood of his family for the enduring time until retirement.
>
> If the Pastor should become disabled to carry on his work, he shall be paid his full salary until, the disability

> insurance begin to paid [sic] (which is provide [sic] by church) and relieves church of its responsibility to Pastor.
>
> . . . .
>
> Where as, at any time the church shall become dissatisfied with the services of Pastor and ask for his resignation, the congregation at that time, shall take a vote and be governed by the majority of voting members eligible (members in good standing with church). At that time the church shall pay the Pastor the total package in advance or his services shall continue until such time the church shall meet this requirement.

After 10 years of serving as head pastor of the Church, plaintiff contracted kidney disease in September 2011, was hospitalized, and underwent surgery. As a result, he was no longer able to serve as the pastor of the Church. In addition, because the long-term disability insurance policy mentioned in the employment agreement lapsed prior to plaintiff's disability, plaintiff was without any disability coverage. At this point in time, it appears, based on the complaint, that the Church had ceased all payment of plaintiff's salary and benefits.

Plaintiff filed suit against the Church on 25 October 2013. On 23 December 2013, defendants filed a motion to dismiss contending that the trial court did not have jurisdiction to hear this dispute and that plaintiff had failed to state a claim upon which relief could be granted. Defendants subsequently also filed a motion for summary judgment supported by the affidavits of defendants Willie L. Turner and James Hinton on 30 December 2014.

The trial court heard defendant's motion to dismiss on 6 January 2015. Because plaintiff did not receive proper notice of defendant's motion for summary judgment and the accompanying affidavits, the trial court limited the hearing to the motion to dismiss and did not consider the affidavits.[1] On 20 January 2015, the trial court entered an order granting defendants' motion to dismiss. Plaintiff timely appealed to this Court.

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1. Defendants' motion for summary judgment and the accompanying affidavits were included in the Record on Appeal. However, because defendants have made no argument on appeal that the trial court erred in refusing to consider these affidavits, we have not addressed them in this opinion.

Discussion

"This Court reviews de novo a trial court's ruling on a motion to dismiss." *Transp. Servs. of N.C., Inc. v. Wake Cnty. Bd. of Educ.*, 198 N.C. App. 590, 593, 680 S.E.2d 223, 225 (2009). "[T]he question for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Blinson v. State*, 186 N.C. App. 328, 335, 651 S.E.2d 268, 274 (2007). "The court must construe the complaint liberally and 'should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.' " *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (quoting *Block v. Cnty. of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000)), *aff'd*, 357 N.C. 567, 597 S.E.2d 673 (2003).

I

[1] We first address whether plaintiff adequately stated claims for breach of contract and violation of the North Carolina Wage and Hour Act. "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). Here, plaintiff alleged the existence of a written employment contract between himself and the Church, signed by several representatives of the Church on 14 February 2001.

Specifically, plaintiff alleged that he was guaranteed under the contract "salary continuation upon his disability" and "salary, housing, utilities, social security, and medical insurance . . . through February 13, 2013" in consideration for his forfeiture of his previous job's benefits. He further alleged that defendants breached this contractual provision upon their refusal to pay his salary and other benefits when he became disabled. These allegations taken as true are sufficient to state a claim for breach of contract.

In arguing that plaintiff has failed to state a claim for relief, defendants rely on the principle that, in the absence of an employment contract providing for a specified term of employment, plaintiff is an employee at will and cannot sue for breach of contract. This argument is beside the point.

Certainly, it is well established "that absent some form of contractual agreement between an employer and employee establishing a *definite* period of employment, the employment is presumed to be an 'at-will'

employment," but in that event, "the employee states no cause of action for breach of contract *by alleging that he has been discharged without just cause*." *Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987) (second emphasis added), *disapproved of on other grounds by Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 493 S.E.2d 420 (1997). Thus, *Harris* mandates that an "at-will" employee cannot state a claim for breach of contract based on wrongful discharge.

The "at will" doctrine does not preclude an at-will employee from suing for breach of contract with respect to benefits or compensation to which the parties contractually agreed. Thus, in *Brooks v. Carolina Tel. & Tel. Co.*, 56 N.C. App. 801, 804-05, 290 S.E.2d 370, 372 (1982), when the defendant pointed to "at will" cases in arguing that the plaintiff was not entitled to sue for breach of contract with respect to a severance agreement, this Court held: "Those cases dealt with each employee's right to continued employment and did not deal with the issue of benefits or compensation earned *during* employment." Those cases are not apposite to the case now before us. *See also Way v. Ramsey*, 192 N.C. 549, 551-52, 135 S.E. 454, 455 (1926) (acknowledging that minister, who served at pleasure of his church organization, could sue for breach of contract with respect to nonpayment of his salary).

Because plaintiff in this case is not challenging the basis for his dismissal, but only seeks to recover money and benefits owed under the employment contract he alleges he entered into with defendants, the "at will" doctrine is inapplicable. Plaintiff has, therefore, properly alleged a claim for breach of his employment contract's provisions for compensation and benefits.

Plaintiff also alleged a claim under the North Carolina Wage and Hour Act. Defendants do not address the sufficiency of those allegations. The Wage and Hour Act provides: "Every employer shall pay every employee all wages and tips accruing to the employee on the regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly." N.C. Gen. Stat. § 95-25.6 (2015). Further, "[a]ny employer who violates the provisions of . . . G.S. 95-25.6 . . . shall be liable to the employee . . . in the amount of their unpaid . . . compensation, or their unpaid amounts due under G.S. 95-25.6 . . . ." N.C. Gen. Stat. § 95-25.22(a) (2015). *See Meehan v. Am. Media Int'l, LLC*, 214 N.C. App. 245, 262, 712 S.E.2d 904, 914 (2011) (remanding to trial court for determination of salary due pursuant to a claim brought under the Wage and Hour Act).

Plaintiff's allegations that the contractually promised "salary" constituted wages as defined in N.C. Gen. Stat. § 95-25.1 *et seq*. (2015), along

with his allegation that defendant wrongfully failed to pay that salary, sufficiently alleges a claim under the North Carolina Wage and Hour Act. *See Hamilton v. Memorex Telex Corp.*, 118 N.C. App. 1, 10, 454 S.E.2d 278, 282 (1995) ("[O]nce the employee has earned the wages and benefits under this statutory scheme the employer may not rescind them[.]").

II

[2] Defendants primarily based their motion to dismiss on their claim that plaintiff's causes of action are barred by the "ministerial exception" or the "ecclesiastical abstention" doctrine.[2] In making their argument on appeal, however, defendants address almost exclusively the doctrine's applicability to wrongful discharge claims. Although defendants appear to assume that plaintiff is challenging the termination of his employment, his complaint only asserts claims based on the non-payment of contractually agreed upon compensation and benefits. Neither doctrine, therefore, applies to plaintiff's claims.

We first note that although both legal doctrines bar certain claims against religious institutions for reasons arising out of the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution, our appellate courts have not specifically addressed the ministerial exception and have only discussed the jurisdictional limits set in place by the ecclesiastical abstention doctrine. Because plaintiff argues both legal principles are inapplicable to his alleged claims, we address each in turn.

The ministerial exception is best articulated in the United States Supreme Court decision of *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, ___ U.S. ___, 181 L. Ed. 2d 650, 132 S. Ct. 694 (2012). We note that although North Carolina appellate courts have not previously addressed the ministerial exception, we are, of course, under the Supremacy Clause of the United States Constitution, bound by *Hosanna-Tabor*'s application and construction of the First Amendment. *See State v. Elliott*, 360 N.C. 400, 421, 628 S.E.2d 735, 749 (2006) ("The Supreme Court of the United States is the final authority on federal constitutional questions.").

We first note that the parties mistakenly assume that the ministerial exception is a question of subject matter jurisdiction. *Hosanna-Tabor* clarifies, however, that "the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar. That

2. Defendants merge the two doctrines, but since they are analytically distinct, we treat them separately.

is because the issue presented by the exception is 'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has 'power to hear [the] case.' " ___ U.S. at ___ n.4, 181 L. Ed. 2d at 667 n.4, 132 S. Ct. at 709 n.4 (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 254, 177 L. Ed. 2d 535, 546, 130 S. Ct. 2869, 2877 (2010)).

In explaining the ministerial exception, Chief Justice Roberts wrote for the Court: "Since the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers." *Id.* at ___, 181 L. Ed. 2d at 663, 132 S. Ct. at 705. "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.* at ___, 181 L. Ed. 2d at 663, 132 S. Ct. at 706.

At the conclusion of Chief Justice Roberts' opinion, he limited the opinion's holding to the narrow circumstance of "employment discrimination suit[s] brought on behalf of a minister, challenging her church's decision to fire her" and specifically "express[ed] no view on whether the exception bars . . . actions by employees alleging breach of contract . . . ." *Id.* at ___, 181 L. Ed. 2d at 668, 132 S. Ct. at 710.

Defendants, in relying on the ministerial exception set out in *Hosanna-Tabor*, vigorously argue only that "it is the decision of a church to hire or fire its pastor that is protected from judicial scrutiny[.]" Defendants cite no authority and provide no argument why the ministerial exception, as articulated in *Hosanna-Tabor*, should apply to claims based on nonpayment of compensation and benefits.

Although North Carolina courts have not expressly addressed the ministerial exception, other jurisdictions have and, in accordance with *Hosanna-Tabor*, have limited its application to the context of wrongful discharge suits not alleging a breach of contract. The Supreme Court of Kentucky has held that "[secular] courts do have jurisdiction to hear and resolve employment disputes, contract claims, tort claims, or similar. And that authority is not lost as a result of the ministerial exception." *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 608 (Ky. 2014). Applying *Hosanna-Tabor*, the *Kirby* court held that the

ministerial exception barred the plaintiff minister's claim that her discharge by a defendant Seminary was racially discriminatory. 426 S.W.3d at 614-15.

However, the court concluded that plaintiff's breach of contract claim based on the defendant Seminary's violation of its tenure policy was not barred by the ministerial exception:

> When deciding whether a claim is barred by the ministerial exception, it is important to remain mindful of the ministerial exception's underlying purpose: to allow religious institutions, free from government interference, to exercise freely their right to select who will present their faith tenets. Although state contract law does involve the governmental enforcement of restrictions on a religious institution's right or ability to select its ministers, those restrictions are not *governmental* restrictions. Simply put, the restrictions do not arise out of government involvement but, rather, from the parties to the contract, namely, the religious institution and its employee.
>
> Contractual transactions, and the resulting obligations, are assumed voluntarily. Underneath everything, churches are organizations. And, like any other organization, a church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court. Surely, a church can contract with its own pastors just as it can with outside parties. Enforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights.
>
> We are not presented with a situation where the government is inappropriately meddling in the selection of who will minister to the congregation. Limits on a religious institution's ability to choose -- or the criteria for choosing -- who will minister to its faithful are not being foisted on the religious institution. The government had no role in setting the limits on how the Seminary's tenured professors may be terminated. Instead, this is a situation in which a religious institution has voluntarily circumscribed its own conduct, arguably in the form of a contractual agreement, and now that agreement, if found to exist, may be enforced according to its own terms. That

> cannot breach church autonomy. Arguably, instead, this exemplifies religious autonomy because religious institutions are free to set forth policies that align with their respective mission.
>
> Essentially, the Seminary willingly made a decision to offer tenure -- a wholly secular concept -- in exchange for professorial services. Providing substance to the offer of tenure, the Seminary explicitly stated in writing that it would only terminate a tenured professor on three grounds . . . . Of course, under the First Amendment, and the ministerial exception for that matter, the Seminary enjoys the right to excuse ministers as it sees fit. But here, the Seminary circumscribed its right to excuse faculty, ministers or not. The Seminary agreed to only express its First Amendment right under limited conditions.

Id. at 615-16 (internal quotation marks and footnotes omitted).

Based on this analysis, the court concluded: "Accordingly, the Seminary's decision to fire a tenured professor, whether a minister or not, is completely free of any government involvement or restriction. In the absence of government interference, the ministerial exception cannot act as a bar to an otherwise legitimate suit." *Id.* at 617.

Other jurisdictions have similarly concluded that the ministerial exception does not bar contractual claims. *See Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau*, 49 A.3d 812, 817 (D.C. 2012) (declining to extend ministerial exception "to categorically bar any claim whatsoever by a ministerial employee[,]" particularly where employee seeks salary owed under contract); *Galetti v. Reeve*, 331 P.3d 997, 1001 (2014) ("As pled, it appears that Plaintiff can succeed on her breach of contract claim without any religious intrusion. The district court does not need to determine whether the Conference had cause to terminate Plaintiff's employment, but only whether the Conference complied with its contractual obligation . . . .").

We find these decisions persuasive. Accordingly, because plaintiff's complaint does not challenge the Church's decision to terminate his employment, but instead seeks to enforce a contractual obligation regarding his compensation and benefits, we hold that the ministerial exception does not apply and is not a basis for dismissal of plaintiff's claims.

We next address the ecclesiastical abstention doctrine, which North Carolina courts hold is a jurisdictional bar to courts adjudicating

"ecclesiastical matters of a church." *Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 327, 605 S.E.2d 161, 163 (2004) (" 'The courts of the State have no jurisdiction over and no concern with purely ecclesiastical questions and controversies . . . .' " (quoting *Braswell v. Purser*, 282 N.C. 388, 393, 193 S.E.2d 90, 93 (1972))); *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 397 (1998) ("The United States Supreme Court has interpreted [the Establishment Clause] to mean that the civil courts cannot decide disputes involving religious organizations where the religious organizations would be deprived of interpreting and determining their own laws and doctrine.").

"Our Supreme Court has held that a trial court's exercise of jurisdiction is improper only where 'purely ecclesiastical questions and controversies' are involved." *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 492, 598 S.E.2d 667, 670 (2004) (quoting *W. Conference of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962)). An ecclesiastical matter is defined by our courts as " 'one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership . . . .' " *Tubiolo*, 167 N.C. App. at 327, 605 S.E.2d at 163-64 (quoting *E. Conference of Original Free Will Baptists of N.C. v. Piner*, 267 N.C. 74, 77, 147 S.E.2d 581, 583 (1966), *overruled in part on other grounds by Atkins v. Walker*, 284 N.C. 306, 200 S.E.2d 641 (1973)). Thus, "[t]he dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine." *Smith*, 128 N.C. App. at 494, 495 S.E.2d at 398.

"While the Courts can under no circumstance referee ecclesiastical disputes," *Tubiolo*, 167 N.C. App. at 329, 605 S.E.2d at 164, they "do have jurisdiction, as to civil, *contract* and property rights which are involved in, or arise from, a church controversy." *Reid v. Johnston*, 241 N.C. 201, 204, 85 S.E.2d 114, 117 (1954) (emphasis added), *validity questioned on other grounds by Atkins*, 284 N.C. at 317, 200 S.E.2d at 649. *See also Way*, 192 N.C. at 551, 135 S.E. at 455 ("[T]he question of liability for the salary of a minister or pastor is governed by the principles which prevail in the law of contracts, and it is generally held that a valid contract for the payment of such a salary will be enforced."). However, the controversy must be resolved "pursuant to 'neutral principles of law[.]' " *Atkins*, 284 N.C. at 319, 200 S.E.2d at 650 (quoting *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449, 21 L. Ed. 2d 658, 665, 89 S. Ct. 601, 606 (1969)).

Defendants seem to argue, without citing any pertinent authority, that the First Amendment of the United States Constitution immunizes, without exception, a religious institution from liability arising out of a contract between the religious institution and its ministerial employees. This unsupported assertion cannot be reconciled with *Smith*. This Court in *Smith* concluded that a holding " 'that a religious body must be held free from any responsibility for wholly predictable and foreseeable injurious consequences of personnel decisions, although such decisions incorporate no theological or dogmatic tenets -- would go beyond First Amendment protection and cloak such bodies with an exclusive immunity greater than that required for the preservation of the principles constitutionally safeguarded.' " 128 N.C. App. at 495, 495 S.E.2d at 398 (quoting *Jones v. Trane*, 153 Misc. 2d 822, 830, 591 N.Y.S.2d 927, 932 (1992)).

Although defendants cite numerous decisions holding that civil courts cannot interject themselves into ecclesiastical disputes, they again focus their argument on the bar against courts determining the propriety of a church's decision to dismiss a plaintiff from his position as pastor -- an issue not present in this case. The only authority that defendants cite as barring a claim regarding compensation is *Tarasi v. Jugis*, 203 N.C. App. 150, 692 S.E.2d 194, 2010 WL 916050 at *2, 2010 N.C. App. LEXIS 493 at *3-5 (2010) (unpublished), in which this Court applied the ecclesiastical abstention doctrine when holding that the trial court lacked jurisdiction over a Wage and Hour Act claim.

In *Tarasi*, the plaintiff priest filed a Wage and Hour Act claim against the Roman Catholic Diocese of Charlotte and its bishop, alleging that, after being instructed by the Vatican to provide the plaintiff " 'with an adequate means of livelihood and the appropriate necessities as envisioned in canons 281 § 1 and 384 of the Code of Canon Law,' " the defendants failed to do so. *Id.*, 2010 WL 916050 at *1, 2010 N.C. App. LEXIS 493 at *2. In affirming the trial court's dismissal of the plaintiff's Wage and Hour Act claim, this Court held that "[t]o determine his claim, the court would be required to determine, under ecclesiastical law, the compensation to which plaintiff is entitled" and that "[s]uch a determination is beyond the subject matter jurisdiction of the North Carolina courts . . . ." *Id.*, 2010 WL 916050 at *2, 2010 N.C. App. LEXIS 493 at *5.

Thus, in *Tarasi*, the plaintiff was asking the court to decide whether the Catholic diocese had complied with the Vatican's directive -- a request that the court inject itself in the middle of a church dispute and decide what canonical law required. Here, plaintiff's claims, rather than

asking the court to address ecclesiastical doctrine or church law, require the court only to make a secular decision regarding the terms of the parties' contract and to apply the neutral principles of the Wage and Hour Act. Defendants acknowledge that they are not exempt from the Wage and Hour Act.

Accordingly, because a court can decide plaintiff's contract-based claims applying "neutral principles of law," without entangling the Court in an ecclesiastical dispute or interpretation, we hold that the ecclesiastical abstention doctrine does not require dismissal of plaintiff's complaint. We, therefore, hold plaintiff has sufficiently stated claims for relief and, therefore, reverse the trial court's order dismissing plaintiff's complaint.

REVERSED.

Judges HUNTER, JR. and DILLON concur.

STATE OF NORTH CAROLINA
v.
MICHAEL ANTONIO BULLOCK, DEFENDANT

No. COA15-731

Filed 10 May 2016

Search and Seizure—traffic stop—unlawfully extended

The Court of Appeals reversed defendant's convictions for charges involving trafficking of heroin where the police officer unlawfully extended the traffic stop by causing defendant to be subjected to a frisk, sit in the officer's patrol car, and answer questions while the officer searched law enforcement databases for reasons unrelated to the mission of the stop and exceeding routine checks authorized by case law.

Judge McCULLOUGH dissenting.

Appeal by defendant from judgment entered 30 July 2014 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 17 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jon H. Hunt, for defendant-appellant.

GEER, Judge.

Defendant Michael Antonio Bullock was indicted for trafficking in heroin by possession, trafficking in heroin by transportation, and possession with the intent to sell or deliver a Schedule I controlled substance (heroin). Following the denial of defendant's motion to suppress evidence obtained by law enforcement as a result of a search of his vehicle following a traffic stop, defendant pled guilty to the charged offenses. On appeal, defendant argues that the trial court erred in denying his motion to suppress because its findings of fact establish that the officer unlawfully extended the stop, making the subsequent search unlawful. In light of the United States Supreme Court's decision in *Rodriguez v. United States*, ___ U.S. ___, 191 L. Ed. 2d 492, 135 S. Ct. 1609 (2015), we agree and hold, based on the trial court's findings of fact, that the officer unlawfully extended the stop and that defendant's consent to the search did not, therefore, justify the search. Accordingly, we reverse.

Facts

The State presented evidence at the motion to suppress hearing that tended to show the following facts. On 27 November 2012, defendant was traveling south on I-85 through Durham. Officer John McDonough of the Durham Police Department was stationary on the side of the interstate when defendant drove past him in the far left lane in a white Chrysler, traveling approximately 70 mph in a 60 mph zone. Officer McDonough observed defendant change lanes to the middle lane "even though there was no car in front of him."

Officer McDonough began following defendant and paced him for about a mile, as defendant continued to maintain a speed of 70 mph, although the speed limit increased to 65 mph. Officer McDonough, while following defendant in a marked patrol car, observed defendant apply the brakes twice and cross over the white shoulder line. He also observed defendant following a truck too closely, coming within approximately one and a half car lengths of it.

Officer McDonough initiated a traffic stop and approached defendant's car from the passenger side. Officer McDonough asked how defendant was doing and for his driver's license and registration. Defendant already had his driver's license out when Officer McDonough approached and his hand was trembling a little. Officer McDonough

observed two cell phones in the center console of defendant's vehicle. Officer McDonough understood defendant as saying that he was going to Century Oaks Drive to meet a girl, but that he had missed his exit.

Officer McDonough asked defendant for the rental agreement for the vehicle once defendant indicated that the car was a rental. The rental agreement specified that the car was rented by an "Alicia Bullock," and "it looked like [defendant] had written his name in at the date part down where the renter signed her name." However, the only authorized user on the rental agreement was Alicia Bullock.

Officer McDonough asked defendant to step back to his patrol car while he ran defendant's driver's license. He shook hands with defendant and told him that he would give him a warning for the traffic violation. He then asked if he could briefly search defendant for weapons before he got into his patrol car. Defendant agreed and lifted his arms up in the air -- Officer McDonough found only cash on him. Defendant later stated that the cash totaled about $372.00. Defendant told Officer McDonough that he was about to go shopping.

While defendant was seated in his patrol car, Officer McDonough ran defendant's North Carolina driver's license through his mobile computer. Officer McDonough's K-9 was located in the back of his police car. Defendant claimed that he had just moved down from Washington, but Officer McDonough learned by running his license that the license was issued back in 2000 and that defendant had been arrested in North Carolina in 2001. Defendant later admitted he had been in the area for a while and claimed he was going to meet a girl he met on Facebook for the first time. However, defendant also mentioned that the same woman would sometimes come up to Henderson to meet him. In addition, when Officer McDonough misidentified the street that defendant had claimed he was traveling to, defendant did not correct him.

Officer McDonough thought defendant looked nervous while he was questioning him in the police car. He noted that defendant was "breathing in and out in his stomach" and was not making much eye contact. Officer McDonough then asked defendant if there were any weapons or drugs in the car and if he could search the vehicle. Defendant gave consent for Officer McDonough to search the car, but not his personal belongings in the car. Defendant clarified that his personal belongings included a bag, some clothes, and some condoms. Officer McDonough called for a backup officer and explained to defendant that he could not conduct a search of a car without a backup officer present. Officer McDonough testified that it took Officer Green around three to

five minutes to arrive, although the surveillance tape indicates closer to 10 minutes elapsed.

While they were waiting for Officer Green, defendant asked what they were waiting for, and Officer McDonough explained that he could get in trouble if he searched the car without another officer present. Defendant asked Officer McDonough what would happen if he did not consent to a search of the car, and Officer McDonough stated that he would then deploy his K-9 dog to search the car. At that time, defendant and Officer McDonough spoke some more about the girl defendant was going to see and other matters unrelated to the traffic stop. Defendant then asked again, "What are we waiting for now?" He also expressed concern to Officer McDonough that he was "going to make me miss this."

Once Officer Green arrived, Officer McDonough began searching the front passenger area of the car. Officer McDonough felt that the car was still "kind of outside the shoulder" so he moved it further off to the side of the road. Officer McDonough rolled down the window of his patrol car in case defendant revoked consent to search the car, but other than limiting the search to not including the bags, defendant never revoked his consent to search his car. Officer McDonough got to the trunk and then defendant yelled out, "it's not my bag" and "those are not my hoodies . . . ." Defendant explained that it was his sister's bag and that he couldn't give Officer McDonough permission to search her bag.

Officer McDonough had Officer Green remove the bag and put it on the grass. He then got his K-9 dog out of the car. The K-9 went around the car and did not alert to any drugs being in the car. Officer McDonough then had his K-9 sniff the bag on the side of the road, and the dog "immediately put his nose on the bag and came to a sit" -- the behavior he exhibits when there is an odor of narcotics. According to Officer McDonough, his K-9 dog has never given a false alert. Officer Green opened the bag and found 100 bindles of heroin in it.

Defendant was indicted on 17 December 2012 by a grand jury for trafficking in heroin by possession, trafficking in heroin by transportation, and possession with the intent to sell or deliver a Schedule I controlled substance. Defendant filed a motion to suppress on 2 July 2014, arguing that the trial court should suppress all of the evidence obtained as a result of the search of the vehicle defendant was driving. A suppression hearing was held on 30 July 2014, and on 4 August 2014, the trial court entered an order denying defendant's motion.

In its order, the trial court made the following findings of fact. Officer McDonough initiated a traffic stop after observing defendant "traveling

70 miles per hour in a 60 mile per hour zone in the far left travel lane." In addition, Officer McDonough observed defendant "come within approximately one and a half car lengths of a silver Ford pickup truck." The trial court noted that Officer McDonough requested defendant's license and registration and that "Defendant's hand was trembling when handing his license over to [Officer] McDonough." Further, the trial court found that defendant was the sole occupant and driver of the car and he "was not listed as an authorized driver" on the rental agreement.

The trial court also found "[t]hat [Officer] McDonough observed that defendant had two cellular phones inside the Chrysler[.]" The trial court found that Officer McDonough "asked defendant where he was traveling" and that "Defendant responded he was going to his girlfriend's house on Century Oaks Drive in Durham and he just missed his exit." The court also found that defendant claimed he just moved from Washington, D.C. to Henderson, North Carolina and indicated that he was using the GPS on his cellphone in order to get to his destination.

In addition, the trial court found:

> That [Officer] McDonough requested defendant to exit the Chrysler and have a seat in McDonough's patrol vehicle in order to check defendant's driver's license. Before defendant sat in the passenger seat of the patrol vehicle, [Officer] McDonough met defendant at the rear of the Chrysler, shook defendant's hand, told him he was going to give him a warning for the traffic violations, and briefly check him for weapons. While checking for weapons, [Officer] McDonough observed a small bundle of United States currency totaling $372.00 in defendant's right side pants pocket. Defendant stated he was about to go shopping.

Next, the trial court found that Officer McDonough told defendant he was receiving a warning ticket and that the reason Officer McDonough did so was "to calm [him] down to be able to gauge nervousness not caused by general fear of getting a ticket." The court also noted that Officer McDonough claimed he asked defendant to sit next to him in his patrol vehicle "to observe defendant when defendant answer[ed] his questions."

The court further found "[t]hat information came back to [Officer] McDonough from the various law enforcement databases that defendant was issued a North Carolina driver's license in 2000 and had a criminal history in North Carolina that began in 2001." Additionally, the court found that Officer McDonough requested that another officer check in

with him so that two officers would be present and able to search the Chrysler. The court also noted that when Officer McDonough questioned defendant about certain items, such as "whether there were any guns in the vehicle, or a dead body in the trunk, defendant was able to make eye contact with [Officer] McDonough while answering the question." When asked about his girlfriend or where he was traveling, however "defendant would not make eye contact and instead looked out the window and away from [Officer] McDonough." Further, "defendant's breathing was elevated and his stomach was rising and falling rapidly."

The trial court then described what happened after Officer McDonough asked defendant if he could search his vehicle, finding "[t]hat [Officer] McDonough asked defendant if he had a problem with him searching the vehicle" and that defendant responded " 'yeah, I don't want you to go in my stuff.' " But, defendant said Officer McDonough could check the car if he wanted. The court indicated "[t]hat at no time did defendant state that he changed his mind and that he did not want [Officer] McDonough to search the Chrysler." Finally, the court found, in Finding of Fact No. 18, that 1,500 bindles of heroin were found in defendant's bag.

Ultimately, the trial court concluded that Officer McDonough had reasonable, articulable suspicion to conduct the traffic stop because defendant was speeding and following another vehicle too closely. Additionally, the court concluded:

> That [Officer] McDonough had reasonable, articulable suspicion to extend the traffic stop based on his observations that: defendant was driving on an interstate where illegal drugs are transported; defendant was operating a rental vehicle which he was not authorized to drive; defendant possessed two cellphones and a small bundle of United States currency; defendant was obviously nervous, deceptive, and evasive as noted in his trembling hands, elevated breathing, and lack of eye contact; and defendant made multiple inconsistent statements regarding his destination, who he was going to meet, and how long he had lived in North Carolina.

After the trial court denied defendant's motion to suppress, he pled guilty to the charged offenses, and the trial court sentenced him to a term of 225 to 279 months imprisonment. Defendant timely appealed to this Court.

Discussion

On appeal, defendant argues that the trial court erred in denying his motion to suppress because the officer unlawfully extended the traffic stop, making the subsequent search unlawful. In reviewing a trial court's ruling on a motion to suppress, this Court "determine[s] only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the court's conclusions of law." *State v. Pulliam*, 139 N.C. App. 437, 439-40, 533 S.E.2d 280, 282 (2000). Conclusions of law are, however, reviewable de novo. *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001).

This appeal is controlled by *Rodriguez*. In addressing the reasonableness of the duration of a traffic stop, the Supreme Court explained:

> A seizure for a traffic violation justifies a police investigation of that violation. A relatively brief encounter, a routine traffic stop is more analogous to a so-called *Terry* stop than to a formal arrest. Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's mission -- to address the traffic violation that warranted the stop, and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. Authority for the seizure thus ends when tasks tied to the traffic infraction are -- or reasonably should have been -- completed.
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> Our decisions in [*Illinois v.*] *Caballes*[, 543 U.S. 405, 160 L. Ed. 2d 842, 125 S. Ct. 834 (2005)] and [*Arizona v.*] *Johnson*[, 555 U.S. 323, 172 L. Ed. 2d 694, 129 S. Ct. 781 (2009)] heed these constraints. In both cases, we concluded that the *Fourth Amendment* tolerated certain unrelated investigations that did not lengthen the roadside detention. In *Caballes*, however, we cautioned that a traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket. And we repeated that admonition in *Johnson*: The seizure remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop. An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. *But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.*

Id. at ___, 191 L. Ed. 2d at 498-99, 135 S. Ct. at 1614-15 (second emphasis added) (internal citations, quotation marks, brackets, and ellipses omitted).

Before the U.S. Supreme Court's *Rodriguez* decision, this Court had recognized essentially the same principles. In *State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 754 (quoting *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998)), *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008), this Court explained that " '[o]nce the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay.' " "To determine whether the officer had reasonable suspicion, it is necessary to look at the totality of the circumstances." *Id.* The Court emphasized that "in order to justify [the officer's] further detention of defendant, [the officer] must have had defendant's consent or 'grounds which provide a reasonable and articulable suspicion in order to justify further delay' *before* he questioned defendant." *Id.*, 654 S.E.2d at 755 (quoting *Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360).

Applying *Rodriguez* and *Myles* to this case, the mission of the stop was to issue a traffic infraction warning ticket to defendant for speeding and following a truck too closely. Officer McDonough's stop of defendant could, therefore, last only as long as necessary to complete that mission and certain permissible unrelated "checks," including checking defendant's driver's license, determining whether there were outstanding warrants against defendant, and inspecting the automobile's registration and proof of insurance. *Rodriguez*, ___ U.S. at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615.

Officer McDonough completed the mission of the traffic stop when he told defendant that he was giving defendant a warning for the traffic violations as they were standing at the rear of defendant's car. With respect to the permissible checks, Officer McDonough checked the car rental agreement -- the equivalent of inspecting a car's registration and proof of insurance -- before he asked defendant to exit his car. Officer McDonough was still permitted to check defendant's license and check for outstanding warrants. But, he was not allowed to "do so in a way that prolong[ed] the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615.

Rather than taking the license back to his patrol car and running the checks, Officer McDonough required defendant to exit his car, subjected him to a pat down search, and had him sit in the patrol car while

the officer ran his checks. The trial court's findings of fact set out the reason Officer McDonough proceeded in this manner. He told defendant that he was giving him just a warning so he could "attribute nervousness to something other than general anxiety from a routine traffic stop." In addition, the trial court found that Officer "McDonough [had] defendant sit in the passenger seat next to him to observe defendant when defendant answer[ed] his questions." Then, apart from just checking defendant's license and checking for warrants, Officer McDonough ran "defendant's name through various law enforcement databases" while he questioned defendant at length about subjects unrelated to the traffic stop's mission.

Under existing case law, an officer may, during a traffic stop, lawfully ask the driver to exit the vehicle. *See*, *e.g.*, *State v. McRae*, 154 N.C. App. 624, 629, 573 S.E.2d 214, 218 (2002) ("When an officer has lawfully detained a vehicle based on probable cause to believe that a traffic law has been violated, he may order the driver to exit the vehicle."). In *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 54 L. Ed. 2d 331, 337, 98 S. Ct. 330, 333 (1977), the United States Supreme Court found that the "additional intrusion" into the personal liberty of the driver by the officer asking him to step out of the car was, at most, "*de minimis*." Although "prior to *Rodriguez*, many jurisdictions -- including North Carolina -- applied a *de minimis* rule, . . . the holdings in these cases to the extent that they apply the *de minimis* rule have been overruled by *Rodriguez*." *State v. Warren*, ___ N.C. App. ___, ___, 775 S.E.2d 362, 365 (2015), *aff'd per curiam*, ___ N.C. ___, 782 S.E.2d 509 (2016). Thus, under *Rodriguez*, even a *de minimis* extension is too long if it prolongs the stop beyond the time necessary to complete the mission. ___ U.S. at ___, 191 L. Ed. 2d at 500-01, 135 S. Ct. at 1616.

The *Rodriguez* Court considered *Mimms* and made comparisons to a dog sniff, noting that while ordering an individual to exit a car can be justified as being for officer safety, a dog sniff could not be justified on the same basis. *Id.* at ___, 191 L. Ed. 2d at 500, 135 S. Ct. at 1616. Even so, the Court noted that the "critical question . . . is not whether the dog sniff occurs before or after the officer issues a ticket, . . . but whether conducting the sniff 'prolongs' -- i.e., adds time to -- 'the stop[.]' " *Id.* at ___, 191 L. Ed. 2d at 501, 135 S. Ct. at 1616. Moreover, the Court focused on whether the imposition or interest "stems from the mission of the stop itself[,]" noting: "On-scene investigation into other crimes . . . detours from that mission. So too do safety precautions taken in order to facilitate such detours." *Id.* at ___, 191 L. Ed. 2d at 500, 135 S. Ct. at 1616 (internal citations omitted).

Even assuming Officer McDonough had a right to ask defendant to exit the vehicle while he ran defendant's license, his actions that followed certainly extended the stop beyond what was necessary to complete the mission. The issue is not whether Officer McDonough could lawfully request defendant to exit the vehicle, but rather whether he unlawfully extended and prolonged the traffic stop by frisking defendant and then requiring defendant to sit in the patrol car while he was questioned. To resolve that issue, we follow *Rodriguez* and focus again on the overall mission of the stop. We hold, based on the trial court's findings of fact, that Officer McDonough unlawfully prolonged the detention by causing defendant to be subjected to a frisk, sit in the officer's patrol car, and answer questions while the officer searched law enforcement databases for reasons unrelated to the mission of the stop and for reasons exceeding the routine checks authorized by *Rodriguez*.

With respect to Officer McDonough's decision, as the trial court found, to "briefly check [defendant] for weapons," it is well established that "[d]uring a lawful stop, 'an officer may conduct a pat down search, for the purpose of determining whether the person is carrying a weapon, *when the officer is justified in believing that the individual is armed and presently dangerous*.' " *State v. Johnson*, ___ N.C. App. ___, ___ S.E.2d ___, 2016 WL 1319083, at *10, 2016 N.C. App. LEXIS 341, at *28-29 (April 5, 2016) (No. COA15-29) (quoting *State v. Sanders*, 112 N.C. App. 477, 480, 435 S.E.2d 842, 844 (1993)) (emphasis added). Here, however, the trial court made no findings suggesting that Officer McDonough was justified in believing that defendant might be armed and presently dangerous. Thus, Officer McDonough's frisk of defendant for weapons, without reasonable suspicion that he was armed and dangerous, unlawfully extended the stop.

The dissent argues that defendant consented to the pat down search. We need not decide, however, whether defendant consented, because the moment Officer McDonough asked if he could search defendant's person, without reasonable suspicion that defendant was armed and dangerous, he unlawfully prolonged the stop. Under *Rodriguez*, other than running permissive checks, any additional amount of time Officer McDonough took that was unrelated to the mission of the stop unlawfully prolonged it.

Officer McDonough then extended the stop further when he had defendant get into his patrol vehicle and ran defendant's name through numerous databases while being questioned, as this went beyond an authorized, routine check of a driver's license or for warrants. The only basis found by the trial court for Officer McDonough's decision to

have defendant get into his patrol vehicle was so that he could "observe defendant when defendant answer[ed] his questions." In other words, the officer was prolonging the detention to conduct a check unrelated to the traffic stop. Under *Rodriguez*, he could "not do so in a way that prolong[ed] the stop absent the reasonable suspicion ordinarily demanded to justify detaining an individual." ___ U.S. at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615. Consequently, given the trial court's finding of fact and *Rodriguez*, Officer McDonough was required to have reasonable suspicion before asking defendant to go to his patrol vehicle to be questioned.

By requiring defendant to submit to a pat-down search and questioning in the patrol car unrelated to the purpose of the traffic stop, the officer prolonged the traffic stop beyond the time necessary to complete the stop's mission and the routine checks authorized by *Rodriguez*. As this Court has recently emphasized in *State v. Castillo*, ___ N.C. App. ___, ___ S.E.2d ___, 2016 WL _____, 2016 N.C. App. LEXIS ____ (May 3, 2016) (No. COA15-855), under *Rodriguez*, investigation unrelated to the mission of the traffic stop "is not necessarily prohibited, but extending the stop to conduct such an investigation is prohibited."

The question is, then, did Officer McDonough have reasonable articulable suspicion that criminal activity was occurring prior to the extended detention? *See Rodriguez*, ___ U.S. at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615 (holding that while officer may engage in checks unrelated to traffic stop, "he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual"); *Castillo*, ___ N.C. App. at ___, ___ S.E.2d at ___, 2016 WL ___, at *__, 2016 N.C. App. LEXIS ___, at *___ (in determining whether officer had reasonable suspicion to extend detention, Court looked at "factors . . . known to [the officer] while he stood on the roadside before defendant joined him in the patrol vehicle").

" '[A] trial court's conclusions of law regarding whether the officer had reasonable suspicion [or probable cause] to detain a defendant is reviewable *de novo*.' " *State v. Hudgins*, 195 N.C. App. 430, 432, 672 S.E.2d 717, 718 (2009) (quoting *State v. Wilson*, 155 N.C. App. 89, 93-94, 574 S.E.2d 93, 97 (2002)). Thus, we review de novo the trial court's conclusion in this case that Officer McDonough had reasonable, articulable suspicion to extend the defendant's detention.

Based on the trial court's findings, the only information that Officer McDonough had to raise suspicion prior to the officer subjecting defendant to the *Terry* pat down was: (1) defendant was driving on I-85, an

interstate used for the transport of drugs; (2) defendant was operating a rental vehicle that he was not authorized to drive; (3) defendant possessed two cellphones; (4) defendant's hand trembled when he handed the officer his license; (5) defendant told the officer he was going to Century Oaks Drive, but had missed his exit, when in fact he had passed three major exits that would have allowed defendant to reach his claimed destination; and (6) defendant, when first observed, was traveling in the far left hand lane and did not appear to be intending to exit off of I-85. However, these circumstances, considered together, give rise to only a hunch and not the particularized suspicion necessary to justify detaining defendant. *See State v. Fields*, 195 N.C. App. 740, 744, 673 S.E.2d 765, 767-68 (2009) (holding that "police officer must develop more than an unparticularized suspicion or hunch before he or she is justified in conducting an investigatory stop" (internal quotation marks omitted)).

Officer McDonough's testimony and the trial court's findings that the officer told defendant he would get a warning ticket so that the officer would then be able to distinguish between nervousness over receiving a ticket and nervousness for other reasons shows that the nervousness before the warning -- the hand tremble -- was not enough to raise a suspicion. *See Myles*, 188 N.C. App. at 49, 654 S.E.2d at 757 (noting that the Supreme Court has held "that a defendant's extreme nervousness may be taken into account in determining whether reasonable suspicion exists"). Mere trembling of a hand when handing over a driver's license cannot be considered "extreme nervousness," *id.*, and, therefore, this tremble is not relevant to the totality of the circumstances. *See also State v. Pearson*, 348 N.C. 272, 276, 498 S.E.2d 599, 601 (1998) (noting that "[t]he nervousness of the defendant is not significant" because "[m]any people become nervous when stopped by a state trooper").

The other circumstances, without more, describe innocent behavior that even collectively does not raise a particularized suspicion of criminal activity. *See Myles*, 188 N.C. App. at 47, 50, 51, 654 S.E.2d at 756, 758 (holding no reasonable suspicion existed to extend traffic stop when rental car occupants' stories did not conflict, rental car was rented by passenger rather than driver, there was no odor of alcohol although car had weaved in lane, officer found no contraband or weapons upon frisking driver, and driver's license was valid, although driver's "heart was beating unusually fast" and rental car was one day overdue).

Indeed, the trial court's finding of reasonable suspicion depended substantially on circumstances that arose after Officer McDonough had extended the stop, including the discovery that defendant had $372.00 in cash, defendant's elevated breathing and lack of eye contact, and his

multiple inconsistent statements regarding his destination, who he was going to meet, and how long he had lived in North Carolina. Although both the trial court and Officer McDonough, in his testimony, relied substantially on inconsistencies in defendant's story that developed while he was questioned in the officer's patrol car, defendant's initial explanation for missing his exit -- he was talking on his cell phone -- presented no inconsistent statement and was not implausible without consideration of the further questioning. The State has pointed to no authority that suggests that in the absence of the post-extension circumstances, the circumstances present in this case prior to the frisk were sufficient to give rise to reasonable suspicion.

However, we find the Fourth Circuit's decision in *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011), persuasive. In *Digiovanni*, the Fourth Circuit acknowledged that "[t]he Supreme Court has recognized that factors consistent with innocent travel can, when taken together, give rise to reasonable suspicion." *Id.* at 511. On the other hand, "[t]he articulated innocent factors collectively must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied." *Id.* (internal quotation marks omitted).

The officer in *Digiovanni* claimed to have developed reasonable suspicion to prolong the traffic stop due to 10 factors, including that: (1) the car was a rental car; (2) the car was coming from a known drug-supply state (Florida); (3) the car was travelling on I-95, a known drug corridor; (4) the car was clean; (5) two shirts hanging in the back; (6) toiletry bag in backseat; (7) the defendant's hands trembled; (8) the defendant's response to questions; (9) the defendant's travel itinerary; and (10) the defendant said, " 'oh boy' " when the officer asked if he had any luggage in the car and if everything in the car belonged to him. *Id.* at 512. The Fourth Circuit dismissed the officer's reliance on the clean car, the two shirts, and the toiletry bag as absurd and accepted the district court's finding that the defendant's " 'oh boy' " statement referred to the heat. *Id.*

Turning to the remaining circumstances, the Fourth Circuit reasoned:

> With regard to the car rental, the traveling on I-95, and the traveling from Florida factors, there is little doubt that these facts enter the reasonable suspicion calculus. With regard to [the defendant's] travel itinerary, [the officer] certainly was entitled to rely, to some degree, on its unusual nature in determining whether criminal activity was afoot.

> Nevertheless, we agree with the district court that reasonable suspicion was not present to turn this routine traffic stop into a drug investigation. The articulated facts, in their totality, simply do not eliminate a substantial portion of innocent travelers. . . . It is true that [the defendant's] travel itinerary is unusual -- not many people are flying from Boston to Miami for the weekend, renting a car for the return trip to Boston, traveling part of the way on the Auto Train, and stopping in New York to pick up some paintings. The problem for the government is that this unusual travel itinerary is not keyed to other compelling suspicious behavior. In this case, other than [the defendant's] unusual travel itinerary, there is nothing compellingly suspicious about the case. There is no evidence of flight, suspicious or furtive movements, or suspicious odors, such as the smell of air fresheners, alcohol, or drugs. All the government can link to the unusual travel itinerary are the facts that [the defendant] rented a car from a source state, was stopped on I-95, and was initially nervous. Such facts, without more, simply do not eliminate a substantial portion of innocent travelers.

Id. at 512-13 (internal citations omitted).

We find *Digiovanni* remarkably similar to this case. As in *Digiovanni*, defendant was driving a rental car, was stopped on I-85, and his hand trembled. The issue with defendant's travel itinerary -- missing multiple exits for his supposed destination while talking on the phone -- was less unusual than that in *Digiovanni*. In addition, defendant had two cell phones, but, just as in *Digiovanni*, there was no compelling suspicious behavior. These circumstances considered together, "without more, simply do not eliminate a substantial portion of innocent travelers[,]" *id.* at 513, and, therefore, do not give rise to reasonable, articulable suspicion. *See also United States v. Williams*, 808 F.3d 238, 246 (4th Cir. 2015) (holding that "the relevant facts articulated by the officers and found by the trial court, after an appropriate hearing, must in their totality serve to eliminate a substantial portion of innocent travelers" (internal quotation marks omitted)).

In this Court's decision in *Castillo*, by contrast, the Court found that the trial court properly determined that an officer had reasonable suspicion to extend a traffic stop based on "defendant's bizarre travel plans, his extreme nervousness, the use of masking odors, the smell of marijuana on his person, and the third-party registration of the vehicle . . . ."

___ N.C. App. at ___, ___ S.E.2d at ___, 2016 WL ___, at *___, 2016 N.C. App. LEXIS ___, at *___. The evidence in this case does not rise to the same level. *See also State v. Cottrell*, ___ N.C. App. ___, ___, 760 S.E.2d 274, 281 (2014) (holding that officer unlawfully extended stop when he based detention on only strong incense-like fragrance and defendant's felony and drug history). Accordingly, we hold that the trial court erred in concluding that Officer McDonough had reasonable articulable suspicion to extend the traffic stop.

However, the trial court also concluded that defendant voluntarily consented to the search of his vehicle. In its order denying defendant's motion to suppress, the trial court concluded "[t]hat defendant gave knowing, willing, and voluntary consent to search the vehicle" and "[t]hat at no point after giving his consent did defendant revoke his consent to search the vehicle." Since we have concluded that Officer McDonough did not have reasonable suspicion to extend the stop, whether defendant may have later consented to the search is irrelevant, as consent obtained during an unlawful extension of a stop is not voluntary. *See Myles*, 188 N.C. App. at 51, 654 S.E.2d at 758 ("Since [the officer's] continued detention of defendant was unconstitutional, defendant's consent to the search of his car was involuntary."); *see also Cottrell*, ___ N.C. App. at ___, 760 S.E.2d at 282 (holding that because officer unlawfully extended stop, did not give defendant his license back, and continuously questioned defendant, "the trial court correctly found that defendant's detention never became consensual in this case").

Thus, we hold that the trial court's order denying defendant's motion to suppress must be reversed. We, therefore, vacate defendant's guilty plea and remand to the trial court for further proceedings consistent with this opinion. Since we vacate defendant's plea, we do not need to address his additional arguments related to whether he entered into it knowing and voluntarily.

REVERSED.

Judge BRYANT concurs.

Judge McCULLOUGH dissents in a separate opinion.

McCULLOUGH, Judge, dissent.

From the majority's conclusion that Officer John McDonough of the Durham Police Department unnecessarily extended the traffic stop

involving Michael Antonio Bullock ("defendant"), I respectfully dissent. The facts are fully set forth in the majority opinion and will not be repeated unless necessary to demonstrate the reasoning of this dissent. Needless to say, traffic stops are some of the most-litigated police-citizen encounters and have long been recognized as fraught with danger to officers. Thus, certain rules have evolved over the years to allow traffic law enforcement to be conducted safely and efficiently. We grapple with those rules in this opinion.

In the case at bar, the majority concludes that the traffic stop in question was extended when the officer caused defendant to exit his car, be subjected to a frisk, and sit in the patrol car while answering questions while the officer ran various data bases, thereby violating the traffic stop rules recently set forth by the United States Supreme Court in *Rodriguez v. U.S.*, __ U.S. __, 191 L. Ed. 2d 492, (2015). I disagree and believe his actions to be reasonable, well within the parameters allowed by *Rodriguez*. It is conceded by defendant that the initial traffic stop was based on reasonable suspicion, thus we focus on what Officer McDonough's actions were from the time he approached the defendant's vehicle until consent was given to search that vehicle.

As the majority opinion notes, before leaving defendant's vehicle, the officer was aware that the car was on I-85, but being a local vehicle and licensee, this factor is not significant; defendant had two cell phones; was not the authorized user of the rental car; defendant told the officer he was going to Century Oaks Drive which was several exits previous to the one where he was stopped; when stopped defendant was accelerating in the far left lane and thus did not appear to be seeking an exit. Defendant had also told the officer he had been on his cell phone as an excuse for how he missed the proper exit. The majority concludes that based on these facts the officer did not have reasonable suspicion to extend the stop. I agree with that conclusion. Where the majority and I disagree is whether a stop is unnecessarily extended by having the motorist accompany the officer to the patrol car while a citation is prepared and data bases are checked.

Police questioning during a traffic stop is not subject to the strictures of *Miranda*, *Berkemer v. McCarty*, 468 U.S. 420, 435-42, 82 L. Ed. 2d 317, 331-36 (1984), and mere police questioning does not constitute a seizure. *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991). As the majority notes, under existing case law, a driver may be ordered to exit the vehicle. *State v. McRae*, 154 N.C. App. 624, 629, 573 S.E.2d 214, 218 (2002). Such orders by police without any reasonable suspicion,

but based on officer safety have long been permitted. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 54 L. Ed. 2d 331, 337 (1977). The ultimate question here is can the officer, as a matter of routine, have the motorist sit in the police vehicle while the officer prepares his citation and runs any data base checks.

In *Rodriguez*, the United States Supreme Court held that a traffic stop cannot be unnecessarily extended while an unrelated investigation is conducted, absent reasonable suspicion. __ U.S. at __, 191 L. Ed. 2d at 496. Even a *de minimis* delay is impermissible. The holding in Rodriguez is actually unremarkable and is essentially what has been the rule for quite a while in North Carolina. *See State v. Myles*, 188 N.C. App. 42, 45, 645 S.E.2d 752, 754, *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008).

The majority opinion relies on two main reasons it believes the traffic stop was unnecessarily extended. First, the majority concludes that the pat down of defendant prior to directing him to sit in the patrol car extended the stop as the officer did not have any reasonable suspicion that defendant was armed and he testified he did not feel threatened. I disagree that this pat down search during which a sum of money ($372) was discovered was an unnecessary extension as the pat down was conducted by consent. At the suppression hearing held on 30 July 2014, Officer McDonough testified as follows:

> A. Just the two phones, and at that point, I asked him to step back to my car, and we were going to run his driver's license.
>
> Q. Okay. And what happened when you made that request?
>
> A. He agreed and got out. I met him in the back of his car. I shook his hand, gave him a warning for the traffic violation, and then I asked him if I could search him before he got into my patrol car.
>
> Q. Okay. And what did he say to you?
>
> A. He said, yes, and he lifted his arms up in the air.
>
> Q. Okay. And then what happened after that?
>
> A. I searched his right pants' pocket that had the currency of different denominations, and he said he was about to go shopping.

> Q. Do you know how much money he had in that bundle you were talking about that he was going shopping with?
>
> A. It was -- he told me later on in the traffic stop, I think he said $372.
>
> Q. And when he told you he was going shopping, when did he say that to you?
>
> A. Right when I grabbed the money, that he was going shopping.
>
> Q. And what kind of indicator was that to you?
>
> A. Through my experience, a lot of times guys who are involved in activity of transporting or either be a courier or be involved in it will have large sums of money in their pockets.

I do not believe an officer unnecessarily extends a traffic stop by conducting a consensual search prior to running a driving history check or warrants check on a motorist.

The majority opinion quotes from *Rodriguez* emphasizing that a traffic stop may not be unnecessarily extended while an officer conducts an unrelated investigation. *Rodriguez* also noted however that the officer may conduct certain routine actions, stating:

> Beyond determining whether to issue a traffic ticket, an officer's mission includes "ordinary inquiries incident to [the traffic] stop." Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. (A "warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.").

Rodriguez, __ U.S. at __, 191 L. Ed. 2d at 499, (internal citations omitted).

It should also be noted that Officer McDonough's questioning defendant about his travel plans, usually referred to as "coming and going" questions are part and parcel of a traffic stop as the questions and answers given can impact driver fatigue and other traffic related issues. *See U.S. v. Barahona*, 990 F.2d 412, 416 (8th Cir. 1993); *Ohio v. Carlson*,

657 N.E.2d 591, 599 (Ohio Ct. App. 1995). In the case at bar the officer was also confronted by an unauthorized operator of a rental vehicle. The use of rental vehicles by unauthorized users was one of the major indicators of unlawful activity that the officer stressed in his suppression hearing testimony. Depending on what his data base checks revealed, Officer McDonough might have an individual who was in violation of several motor vehicle laws, N.C. Gen. Stat. § 14-72.2 (unauthorized use of motor-propelled conveyance) or even N.C. Gen. Stat. § 20-106 (possession of stolen vehicle). In other words, the officer is not obligated to credit the motorist's version of how he came into possession of the vehicle, but is entitled to conduct a short investigation into the circumstances. *See United States v. Sharpe*, 470 U.S. 675, 84 L. Ed. 2d 605 (1985).

With this background in mind, we must face the issue presented by the majority opinion, namely whether Officer McDonough had the authority to direct defendant to sit in the patrol car with him as he wrote him a warning ticket and conducted his background checks. For if he had that authority, almost immediately after sitting down in the patrol car defendant provided information that evolved into reasonable suspicion. If the encounter is to be limited to what the officer knew roadside, the majority opinion is correct and the trial court should be reversed. As far as delaying the mission of the traffic stop, directing a motorist to sit in the police vehicle does not in any way delay the traffic stop. The majority recognizes that the traffic stop is not unnecessarily extended while the officer prepares the ticket and runs his data base checks. Directing the motorist to accompany the officer does not create unnecessary delay as the two (motorist and officer) will walk to the police car in the same length of time as if the officer had walked alone.

Whether an officer can direct a motorist to sit in the police vehicle while these actions are taken, is an open question in North Carolina. The courts that have considered this issue view it through the prism of an additional seizure. Many cases, state and federal, have implicitly recognized that officers have the authority to direct a motorist to sit in the police vehicle while the ticketing process is accomplished. *See*, *Barahona*, 990 F.2d at 414 (in which the officer asked the defendant to exit the car and accompany him to the patrol car). Several federal courts have concluded that an officer needs a reasonable justification, normally a specific, articulable safety concern, before the officer may direct a motorist to sit in the patrol vehicle, *see U.S. v. Cannon*, 29 F.3d 472, 476-77 (9th Cir. 1994), *U.S. v. Ricardo D.*, 912 F.2d 337, 340-41 (9th Cir. 1990), while other courts have determined that if an officer's request is merely part of the ticketing procedure, then having the motorist sit in

the police vehicle is within the permissible scope of a *Terry* stop. *See U.S. v. Rodriguez*, 831 F.2d 162, 166 (7th Cir. 1987), *U.S. v. Rivera*, 906 F.2d 319, 322-23 (7th Cir. 1990), *U.S. v. Bloomfield*, 40 F.3d 910, 915 (8th Cir. 1994) (reasonable investigation includes requesting that the driver sit in the patrol car), *Ohio v. Lozada*, 748 N.E.2d 520, 523 (Ohio Ct. App. 2001). Even those jurisdictions which believe the officer needs some justification to direct a motorist to accompany him or her to the patrol vehicle recognize some exceptions. Here Officer McDonough was faced with an unauthorized user of a rental vehicle. At the moment he directed defendant to proceed to the police vehicle, as stated earlier, he did not know if the data base check might reveal a reported theft. Even verification of defendant's story that he borrowed the car from a relative who was the renter could be facilitated by defendant's presence.

Thus, I maintain that an officer acts within the constitutional parameters of a "*Terry* stop" when he directs a motorist to accompany the officer to the police vehicle during the ticketing process. Based on the line of cases cited previously, it is my position that under either line of cases, Officer McDonough was justified in directing defendant to sit in the patrol car, even if it was only to be of assistance in determining if defendant had permission to use the vehicle from the renter. We know he did not have the owner's permission as he was not on the rental agreement. Upon entering the vehicle, defendant almost immediately provided enough information to provide the officer with enough reasonable suspicion to extend the stop until he received consent to search. It is not contested that consent was given, the only issue concerns whether the stop was unnecessarily extended in violation of *Rodriguez* so that the officer was never in a position to ask for consent.

At the suppression hearing Officer McDonough testified as follows:

> A. I told him to have a seat in the patrol car.
>
> Q. And did he comply?
>
> A. Yes, sir.
>
> Q. And when you had him in your patrol vehicle, what happened?
>
> A. At that point, I started -- got his license and started running his license and other information in my mobile computer.
>
> Q. Can you walk the Court through when you're running someone's name like how many programs are you running the names through?

A. There's about three databases that I usually use. One is for our police program, CJ Leads, and I use a program called "TLO", also.

Q. What do those programs actually tell you?

A. CJ Leads will give all criminals in North Carolina. Our program will have driver's -- had arrested in Durham, and TLO usually helps with people from out-of-state, shows their criminal history from out-of-state.

Q. Do you have an idea how long it takes you to run a CJ Lead or how long it takes to run somebody's license?

A. It takes a little bit because we have to go in and out, log in, run a wire -- so it takes a little bit.

Q. You said it takes a little bit, like are you talking seconds, minutes?

A. It takes minutes.

Q. So while you're running his name through various databases, what is happening?

A. Well, I remember when he first got in the car and -- where he was going, he said he just moved down here from Washington. So I started running that in CJ Leads and TLO, he said he was from Washington. When I ran his driver's license, it was issued back in 2000, and he had been arrested in North Carolina starting 2001. So he's already been down here 12 years when he said he just moved down here from Washington.

Q. What does that tell you?

A. I just thought I [sic] was strange because you just moved down here from Washington, but you've been here for 12 years. You didn't just move down from Washington. I don't know if he's just trying to throw that out at me, to throw me off or not.

Q. And what happened after you noticed that he had a license since 2000, and you were looking at records, an arrest record that started from 2001, and had indicated to you on November 27th, 2012 that he had just moved from DC?

A. We started having some conversation. He did later say that he's been down here awhile, started talking about how he met this girl, he said he met her on Facebook, known her about two weeks, and he said it's the first time he came down here to meet her because she always comes to Henderson. And I think we were discussing his criminal history. He mentioned about the gun, he said he had two occasions where his ex-wife had put the gun in the glove box, and he was driving the car and got arrested for it in Vance County, and I think South Carolina -- and he started asking me questions about why I think that happened in Vance County while it was running his information.

Q. So taking a step back, so you are discussing you mention about how he met the girl he was apparently going to see on Century Oaks. Was there anything of note in your discussion about the woman he was apparently going go see?

A. Like I said, he said he just met her on Facebook. He never met her face-to-face, but he confused me when he says, well, she always comes up to Henderson; if he never met her face-to-face, how does she always come to Henderson. And later on in the conversation, he said she's come to Henderson, but he's never met her I believe.

Q. So when you're speaking in regards to the girlfriend, what does that tell you?

A. That tells me that that story is -- he's not telling the truth about that story.

After having this conversation and running defendant's driver's license record as *Rodriguez* permits while also checking for warrants, Officer McDonough obtained reasonable suspicion to extend the stop and request consent to search. To summarize, the officer not only had that information he obtained prior to proceeding to the police vehicle, he also knew defendant had a sum of cash ($372), defendant had not just come down from D.C. as claimed initially, but had been here since 2000, thus his story about not being that familiar with the roads is likely to be untrue, and defendant made contradictory statements about the girl he was going to meet. Also, during this dialogue, the officer twice mispronounced the name of the street defendant said he was going to without any correction being made by defendant. Contradictory statements

regarding one's destination are a strong factor in providing reasonable suspicion. *See U.S. v. Carpenter*, 462 F.3d 981, 987 (8th Cir. 2006). After the conversation, while the data base for defendant's drivers license was checked, the officer had reasonable suspicion to detain defendant and ask for consent to search. I would then affirm the decision of the trial court to deny the motion to suppress.

STATE OF NORTH CAROLINA
v.
JOSHUA EARL HOLLOMAN, DEFENDANT

No. COA15-1042

Filed 10 May 2016

1. Criminal Law—instructions—self-defense—deviation from pattern instruction

The trial court erred in an assault with a deadly weapon inflicting serious injury case in its instruction on self-defense. The trial court's deviations from the pattern self-defense instruction, taken as a whole, misstated the law by suggesting that an aggressor could not under any circumstances regain justification for using defensive force.

2. Appeal and Error—improper personal feelings—issue not addressed—not likely to happen at retrial

Although defendant asserted that the trial court erred during sentencing by allegedly making comments demonstrating that it improperly considered certain personal feelings when sentencing defendant, the issue was not addressed. The case was reversed and remanded for a new trial, and the trial court was not likely to repeat the comments.

Appeal by Defendant from Judgment entered 27 April 2015 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 25 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Amanda S. Zimmer, for Defendant-appellant.

INMAN, Judge.

Joshua Earl Holloman ("Defendant") was convicted of assault with a deadly weapon inflicting serious injury. He appeals from a judgment entered 27 April 2015 that sentenced him to 25–42 months imprisonment but suspended the sentence, placing him on special probation.

Defendant argues that the trial court's instruction on self-defense mislead the jury and inaccurately stated the law and that the trial court improperly considered its personal feelings during sentencing. After careful consideration, we hold that the trial court committed reversible error in its instructions. As a result, Defendant is entitled to a new trial.

I. Background

In the early morning hours of New Year's Day 2014, Mariah Mann ("Ms. Mann") contacted Defendant via cellphone, requesting that he drive and pick her up on the corner of Martin Luther King Boulevard and Rock Quarry Road in Raleigh. At that time Ms. Mann was with Darryl Bobbitt ("Mr. Bobbitt"). Defendant drove from Wendell to Raleigh and stopped in the middle of Martin Luther King Boulevard when he saw Ms. Mann and Mr. Bobbitt on the side of the road. Ms. Mann recognized Defendant's vehicle, a silver Lincoln, as he approached. Defendant, who was armed with a handgun, got out of his vehicle and during an exchange with Mr. Bobbitt shot him multiple times. Mr. Bobbitt, who also was armed with a handgun, fired shots at Defendant. Several accounts of the incident were presented at trial, each differing slightly.

Mr. Bobbitt told police that Defendant got out of the car and asked "Did you put your hands on her?" Mr. Bobbitt said he could tell Defendant had a gun hidden behind his leg. Defendant then approached Mr. Bobbitt with the gun and fired multiple times. Mr. Bobbitt pulled his own gun out of his pocket and fired it twice. Mr. Bobbitt fell to the ground and Defendant continued to fire.

Defendant testified as follows: When he arrived to pick up Ms. Mann, he saw Mr. Bobbitt following her. Defendant then got out of his car with his gun and told Ms. Mann to get in the car. Defendant noticed that Ms. Mann had blood on her face. Defendant asked Mr. Bobbitt if he had put his hands on her. Mr. Bobbitt turned his back on Defendant until Defendant stepped closer and asked again if Mr. Bobbitt had put his hands on Ms. Mann. Mr. Bobbitt then turned around and opened fire on Defendant. Defendant feared for his life when he shot Mr. Bobbitt. Defendant left the scene after Mr. Bobbitt fell to the ground.

Ms. Mann testified that Defendant got out of the Lincoln and asked Mr. Bobbitt if he had put his hands on her. She told police that Mr. Bobbitt aimed a gun at defendant and Ms. Mann got into the Lincoln. She then heard gunshots.

Anna Dajui was driving her fifteen-year-old daughter Roxana home from a party when she observed an "elegant," "black vehicle, like the kind a detective would drive" pull out in front of her onto Martin Luther King Boulevard and stop. She then saw the driver exit the "elegant" vehicle and shoot a pedestrian twice. Roxana, who was sitting in the back of the van her mother was driving, also saw the driver of a big car with rims stop in the middle of the road and shoot someone.

By coincidence, Sergeant J.W. Bunch ("Sergeant Bunch") of the Raleigh Police Department was also present at the intersection when the shots were fired. He testified that he was around thirty yards away from the incident. He saw a light-colored Lincoln Town Car stopped in the road. The driver of the Lincoln stepped out around the front of the vehicle and confronted two pedestrians, a woman and a man. Sergeant Bunch then heard a loud verbal altercation, but had the windows of his police vehicle rolled up and could not understand the words that were being said. He saw the driver usher the woman into the passenger seat of the car. The driver then grabbed the male pedestrian with his left arm and shots were fired. The male pedestrian tried to run toward the back of the car and the driver followed him while firing his gun. Sergeant Bunch got out of his vehicle and saw the pedestrian on the ground and the driver standing over him, pointing a gun at him. Sergeant Bunch fired a shot, aiming high, but Defendant did not move. Sergeant Bunch fired two more shots and Defendant looked at him, yelled "Oh, shit," and ran away.

Mr. Bobbitt was shot four times: twice in the stomach, once in the left leg, and once in the right arm. He had to undergo four surgeries and remained in the hospital for over a week. His right arm is permanently disabled as a result of his injuries.

On 24 February 2014, Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. The matter came on for trial on 20 April 2015. The jury found Defendant guilty of assault with a deadly weapon inflicting serious injury.

II. Jury Instruction on Self-Defense

[1] Defendant argues that the trial court committed reversible error in its instruction on self-defense by suggesting that if Defendant initiated the altercation, he could not be found to have acted in self-defense. We agree.

A. Appellate Jurisdiction and Standard of Review

The State, citing *State v. Wilkinson*, 344 N.C. 198, 236, 474 S.E.2d 375, 396 (1996), contends that because Defendant requested a special instruction on self-defense deviating from the pattern instruction, any error by the trial court in this regard was invited error, which is not subject to appellate review. We disagree, because unlike the defendant in *Wilkinson*, Defendant here did not consent to the manner of instructions provided by the trial court. Rather, Defendant submitted a written request for an alternative special instruction on self-defense. His appeal is not barred.

Because the trial court's instruction on self-defense differed from the instruction requested by Defendant, our standard of review is *de novo*, even though Defendant did not specifically object to the trial court's jury instructions before the jury retired to consider its verdict. *State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984) (A defendant who submitted a written request for particular jury instructions that the trial court denied was "not required . . . to repeat his objection to the jury instructions, after the fact[] in order to properly preserve his exception for appellate review."); *State v. Montgomery*, 331 N.C. 559, 570, 417 S.E.2d 742, 748 (1992) ("The defendant's written request for a particular instruction . . . met the requirements of Appellate Rule 10[(a)(2)] and constituted a sufficient objection to the different instruction actually given to preserve this issue for appellate review."). Here, as in *Smith* and *Montgomery*, the trial court gave a different instruction than those Defendant requested, and none of the portions of the challenged instruction were included in the instruction requested by Defendant.

The standard of review for jury instructions is well established:

> On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Hammel v. USF Dugan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (citations and quotation marks omitted).

B. Analysis

The trial court's instruction deviated from North Carolina Pattern Jury Instruction 308.45 in certain respects, as explained below. The trial court was not required to follow the pattern instructions, so deviation is not *per se* error.

> [W]hile the use of pattern jury instructions is encouraged, it is not required, and failure to follow the pattern instructions does not automatically result in error because we do not require adherence to any particular form, as long as the trial court's instruction adequately explains each essential element of an offense.

State v. McLean, 211 N.C. App. 321, 328, 712 S.E.2d 271, 277 (2011) (citation and quotation marks omitted).

Defendant asserts that he was deprived of the right to fully present his defense because of the trial court's omission of an instruction to the jury that even an initial aggressor may be justified in using defensive force in certain circumstances. He further contends that the trial court's instruction that "[j]ustification for lawful self-defense is not present if the person who uses defensive force voluntarily enters into a fight with the intent to use deadly force" is an incomplete and thus inaccurate statement of the law. Defendant argues error and prejudice, because the trial court did not explain to jurors that a person who voluntarily enters a fight can regain justification for using defensive force under certain circumstances.

In 2011, the General Assembly enacted a series of statutes related to self-defense and individual rights related to firearms. 2011 N.C. Sess. Laws 1002 (described in bill synopsis as "[a]n act to provide when a person may use defensive force and to amend various laws regarding the right to own, possess, or carry a firearm in North Carolina"). Among the new statutes added were N.C. Gen. Stat. § 14-51.3 (2015), entitled "Use of force in defense of person; relief from criminal or civil liability," and N.C. Gen. Stat. § 14-51.4 (2015), entitled "Justification for defensive force not available." Neither statute has been amended since it was enacted.

Section 14-51.3 provides in pertinent part:

> (a) . . . [A] person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if . . .

> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

Section 14-51.4 provides in pertinent part:

> [J]ustification [for defensive force] is not available to a person . . . who:
>
> (2) [i]nitially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur:
>
> a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.
>
> b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.

Prior to the 2011 legislation, the law of self-defense in North Carolina was largely governed by common law.[1] The new statute expressly provides that it "is not intended to repeal or limit any other defense that may exist under the common law." N.C. Gen. Stat. § 14-51.2(g) (2015).

Witness accounts given at trial differed regarding whether Defendant or Mr. Bobbitt drew a gun first. Defendant testified that he did not know about Mr. Bobbitt's gun until Mr. Bobbitt fired at him. Defendant testified at trial and argues that the force used by Mr. Bobbitt against him was so

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1. A few statutes inapposite to this appeal were enacted before 2011. *See, e.g.*, N.C. Gen. Stat. § 14-51.1 (1993) (repealed by Sess. Laws 2011 ch. 268) (modifying the law of self-defense of one's home).

serious as to lead Defendant to reasonably believe that he was in imminent danger of death or serious bodily harm, that he had no reasonable means to retreat, and that the use of force likely to cause death or serious bodily harm to Mr. Bobbitt was the only way to escape the danger, thus satisfying the requirements of N.C. Gen. Stat. § 14-51.4(2)(a).

Defendant contends that the trial court erred in its self-defense instruction by omitting a key phrase and by changing the order of a portion of the pattern instruction which explained that under circumstances provided in N.C. Gen. Stat. § 14-51.4(2)(a) and supported by the evidence in this case, an aggressor may engage in lawful self-defense.

The trial court instructed jurors that if they found that Defendant had assaulted Mr. Bobbitt with intent to cause death or serious injury, they would then have to consider whether Defendant's actions were excused because Defendant acted in lawful self-defense. The trial court instructed the jury, *inter alia*, as follows:

> A person is justified in using defensive force to defend himself when *the force used against him* is so serious that the person using defensive force reasonably believes that he is in imminent danger of death or serious bodily harm, the person using defensive force has no reasonable means to avoid the use of that force, and his use of force likely to cause death or serious bodily harm is the only way to escape the danger.

(emphasis added). The phrase "the force used against him" in the trial court's instruction replaced the phrase "the force used by the person who was provoked" used in the pattern instruction. Defendant contends the omitted phrase was necessary to make it clear to the jury that this portion of the instruction referred to defensive force used by Defendant against "the person who was provoked" and not to defensive force used by Mr. Bobbitt.[2] The State contends that because both men claimed that the other fired first, their right to use defensive force was the same, so the

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2. Defendant requested a variation on the pattern instruction that did not omit the phrase he contends was necessary. Defendant's request for special instruction was as follows:

> A person is also justified in using defensive force when the force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force likely to cause death or serious bodily harm was the only way to escape the danger.

trial court's instruction did not misstate the law. This argument misses the point of Defendant's appeal and demonstrates the likelihood that the instruction confused the jury. Although Mr. Bobbitt may have also had a right to use defensive force, Defendant—not Mr. Bobbitt—was on trial and it was a question for the jury, properly instructed, to answer.

Defendant contends that the trial court compounded its error by reordering a significant portion of the self-defense instruction in a manner suggesting that because Defendant had initiated the fight, jurors could not under any circumstance find that he acted in self-defense. The trial court provided the explanation of lawful self-defense, quoted above, in the initial definition of self-defense. The pattern instruction, by contrast, provides this explanation later in a separate paragraph relating to the claim of self-defense by a defendant who was the aggressor.

The trial court instructed jurors, consistent with the pattern instruction in the separate paragraph, that "self-defense is justified only if the defendant was not himself the aggressor." Because the trial court did not then instruct jurors that an aggressor may be justified in using defensive force against certain "force used by the person who was provoked," and because of the placement of that portion of the instruction—before, rather than after, the "aggressor" exclusion—Defendant contends that jurors were misled to believe that if they found Defendant had started the fight with Mr. Bobbitt, Defendant could not, under any circumstance, lawfully defend himself against Mr. Bobbitt, which is contrary to factors provided in Section 14-51.4(2)(a).

The trial court also defined the term "aggressor" more narrowly than the pattern definition. The pattern instruction defines the "aggressor" as a person who "voluntarily entered into the fight or, in other words, initially provoked the use of force against himself," N.C.P.I.—Crim. 308.45 (2012), and immediately follows that definition with an explanation of the statutory circumstances in which an aggressor can lawfully defend himself. The trial court defined "aggressor" as a "person who uses defensive force [and] voluntarily enters into a fight with the intent to use deadly force." The trial court further explained:

> In other words, if one initially displays a firearm to his opponent, intending to engage in a fight and intending to use deadly force in that fight and provokes the use of deadly force against himself by an alleged victim, he is himself an aggressor and cannot claim he acted lawfully to defend himself.

The trial court included this instruction in its substantive discussion of the felony charge of assault with a deadly weapon with intent to kill inflicting serious injury. The trial court did not repeat its discussion of self-defense in its subsequent instruction on the lesser felony charge of assault with a deadly weapon inflicting serious injury.

The State appears to argue that the trial court's narrowed definition of "aggressor" as a person who acts "with the intent to use deadly force" insulated Defendant from any prejudice that could have resulted from the remainder of the self-defense instruction, because the jury by its verdict found that Defendant did not intend to kill Mr. Bobbitt.[3] The intent to kill, however, is not the same as the intent to use deadly force. A person who shoots another person with the intent to frighten, maim, injure, or with no specific intent does not intend to kill, but necessarily intends to use deadly force—a firearm.

In the final mandate for both charges, the trial court instructed jurors as follows:

> I further instruct you that, even if you are satisfied beyond a reasonable doubt that the defendant committed either of the felony assaults with a deadly weapon which I have defined, you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that the defendant's action was not in lawful self-defense; that is, that the defendant did not reasonably believe that the assault was necessary or appeared to be necessary to protect the defendant from death or serious bodily injury, or that the defendant used excessive force, or that the defendant was the aggressor, as I have defined that term to you.

The final mandate on self-defense was virtually identical to the pattern instruction. However, because the trial court's substantive explanation of self-defense eliminated references to circumstances in which an aggressor can lawfully defend himself, the mandate lends itself to the suggestion that if jurors determined Defendant had initiated the gun fight, they could not find that he acted in lawful self-defense, even if Mr. Bobbitt fired his gun first.

The trial court's deviations from the pattern self-defense instruction, taken as a whole, misstated the law by suggesting that an aggressor

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3. The State also argues that any error in the definition of "aggressor" was invited by Defendant, who also requested a special instruction referring to "the aggressor with the intent to kill or inflict serious bodily injury." As explained above, we reject that argument

cannot under any circumstances regain justification for using defensive force. Accordingly, the trial court erred. *See generally State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971) ("The chief purpose of a [jury] charge is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict."); *Hammel*, 178 N.C. App. at 347, 631 S.E.2d at 177 ("The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed.") (citations and quotation marks omitted).

We further hold that there is a reasonable possibility that, had the jury been properly instructed on self-defense, jurors would not have convicted Defendant of assault.[4]

The State argues that even if the trial court's instruction was incorrect, "[g]iven his willing participation in a gun fight and Mr. Bobbitt's resulting injuries, Defendant cannot show a reasonable probability that he would have been acquitted absent the alleged errors." We disagree.

The State's argument is flawed in two ways. First, the State wrongly presumes that to establish prejudice, Defendant is required to show a "reasonable probability that he would have been acquitted" but for the trial court's erroneous instruction. The correct standard, codified in N.C. Gen. Stat. § 15A-1443(a), is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached."[5] N.C. Gen. Stat. 15A-1443(a); *see, e.g.*, *State v. Ramos*, 363 N.C. 352, 355–56, 678 S.E.2d 224, 227 (2009) ("reasonable possibility" of "different result" standard applied to determine that jury instruction was prejudicial and thus reversible); *State v. Strickland*, 307 N.C. 274, 300, 298 S.E.2d 645, 661 (1983), *overruled on other grounds*, *State v. Johnson*, 317 N.C. 193, 203, 344 S.E.2d 775, 781 (1986). Second, the State's argument, like the trial court's instruction, overlooks the statutory defenses provided to Defendant in Section 14-15.4. Based on the evidence viewed in the light most favorable to Defendant, we are persuaded that there is a reasonable possibility that if the trial court had not instructed jurors erroneously, the jury could have reached a different result.

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4. Defendant does not contend that the trial court's error violated his constitutional rights. Accordingly, Defendant bears the burden of showing prejudice. *See* N.C. Gen. Stat. § 15A-1443(a) (2015).

5. Defendant presumed the same wrong standard in his brief, citing only *Williams*, 280 N.C. at 136, 184 S.E.2d at 877, which did not articulate a specific standard and predated Section 15A-1443(a).

III. Statement by the Trial Court Regarding Personal Views

[2] Defendant asserts that the trial court erred when, during sentencing, it made comments demonstrating that it improperly considered certain personal feelings when sentencing defendant. Because we reverse Defendant's conviction and remand this matter for a new trial, and the trial court is not likely to repeat the comments, we need not address this issue.

IV. Conclusion

For the foregoing reasons, we hold that the trial court prejudicially erred in instructing the jury on self-defense. Defendant is entitled to a new trial.

NEW TRIAL.

Judges GEER and TYSON concur.

TOWN OF BEECH MOUNTAIN, Plaintiff
v.
GENESIS WILDLIFE SANCTUARY, INC., Defendant

No. COA15-260

No. COA15-517

Filed 10 May 2016

1. Appeal and Error—interlocutory when appeal filed—final judgment subsequently entered—no longer interlocutory

This appeal was an improper interlocutory appeal when it was filed, but final judgment was subsequently entered, and the Court of Appeals had jurisdiction because the appeal was no longer interlocutory.

2. Landlord and Tenant—lease between town and wildlife center—legality of use

There were no genuine issues of material fact regarding whether Genesis Wildlife Sanctuary (Genesis) was in breach of a lease with the Town by violating the use of property clause. The plain language of the clause only prohibited Genesis from using the leased property for an illegal purpose; Genesis's use was not illegal even if it violated an ordinance concerning a near-by lake. In fact, Genesis's use as a wildlife center was the precise use authorized by the lease.

3. Landlord and Tenant—lease—repairs clause—debris

There was no genuine issue of fact regarding an alleged breach of the repairs clause in a lease between a town and a wildlife sanctuary (Genesis) involving natural and artificial debris on the leased premises. Genesis presented uncontroverted evidence that winter storms had produced tree damage and debris and that Genesis was actively engaged in removing the debris well before the Town provided notice of the potential default. The Town did not presented any basis for concluding that the lease required that Genesis complete its cleanup efforts 10 days after receiving notice of the debris.

4. Evidence—sewage overflows—relevance—other evidence admitted

The trial court did not err by admitting evidence of sewage spills by the Town in an action involving a wildlife refuge near a lake from which the Town drew its water. Other evidence about the sewage overflows was admitted without objection; moreover, the evidence was relevant to the issue of whether a new ordinance intended to eliminate the refuge was arbitrary or capricious.

5. Constitutional Law—substantive due process claim—not barred by possibility of state claim

Genesis Wildlife Sanctuary's 42 U.S.C. § 1983 counterclaim for violation of its substantive due process rights was not barred by Genesis's ability to bring an inverse condemnation action. A substantive due process violation is complete when the wrongful action is taken, rather than when the Stated failed to provide due process. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal remedy is invoked.

6. Constitutional Law—due process—set-back ordinance—drinking water source

The trial court did not err by denying the Town's motions for directed verdict and JNOV in an action involving a wildlife refuge (Genesis), a nearby lake used as a drinking water source, and the Town. Although the Town argued that its adoption of a set-back ordinance was rationally related to a legitimate governmental interest, the Town failed to recognize that Genesis brought an "as applied" counterclaim rather than attacking the facial validity of the ordinance. The evidence presented at trial was sufficient to create genuine issues of fact as to whether the motives of the Town and the purposes behind the 200-foot buffer—that prohibited both outdoor

and indoor animals—were related to the legitimate interest of protecting the Town's water supply or were to prevent Genesis from using its property for the purposes set forth in its 30-year lease with the Town.

7. Jury—jurors' conversation with bailiff—judge's action

The trial judge did not abuse his discretion in refusing to grant a mistrial in an action involving an animal refuge, a lake used as a drinking water source, and a municipal set-back requirement where the judge learned of a conversation between jurors and a bailiff concerning animal waste in water. The trial judge took the appropriate actions to investigate the conversation between the jurors and bailiff, he received an assurance from each juror that he or she was not prejudiced by the conversation with the bailiff, he allowed each party's attorneys to question the jurors, and he explained orally that the conversation regarding sewage in bodies of water did not directly relate to jury's deliberations.

8. Damages—set-back ordinance—enactment—enforcement—not a double recovery

The trial court did not err in denying the Town's Rule 59 motion to amend the amount of damages on account of a double recovery. Genesis Wildlife Sanctuary incurred different damages as a result of different effects produced by the Town's enactment and enforcement of the ordinance at issue.

9. Damages—unclear method for jury verdict—evidence at trial not inconsistent

The trial court did not abuse its discretion in denying the Town's motion for an amended verdict based on the allegations that the jury's award exceeded the actual damages. Although it is unclear exactly how the jury reached its verdict, there was no indication that this amount was inconsistent with the evidence presented at trial.

10. Constitutional Law—amendment of ordinance—mootness—"as applied" claim

The trial court did not err by entering a declaratory judgment that a town ordinance was unconstitutional in an action between the Town and Genesis Wildlife Refuge. Although the Town argued that the issue was moot because the ordinance was amended, Genesis had already incurred monetary damages resulting from the enactment and enforcement of the ordinance, and the elimination of the ordinance did not provide Genesis with the relief it sought, nor did

it alter the fact that the ordinance was unconstitutional as applied to Genesis prior to its amendment.

11. Zoning—set-back ordinance—considered to be zoning

In an action between the Town and Genesis Wildlife Sanctuary concerning a set-back ordinance around a lake that was a drinking water resource, the trial court did not err in its declaration that the ordinance was a zoning ordinance adopted pursuant to N.C. Gen. Stat. § 160A-381(a) (2015), as opposed to an ordinance derived from the Town's police power pursuant to N.C. Gen. Stat. § 160A-174 (2015). Zoning ordinances are specifically adopted for the promotion of the health and general welfare of the community, and the N.C. Supreme Court has traditionally considered "buffer" ordinances, such as the one at issue here, to be zoning ordinances.

Judge DILLON dissenting.

Appeal by plaintiff from orders entered 30 October 2013 and 5 September 2014 by Judges Mark E. Powell and Gary M. Gavenus, respectively, and from judgment and orders entered 29 September 2014, 27 October 2014, and 24 November 2014 by Judge J. Thomas Davis in Watauga County Superior Court. Heard in the Court of Appeals 4 November 2015.

Eggers, Eggers, Eggers, & Eggers, PLLC, by Stacy C. Eggers, IV; and Cranfill Sumner & Hartzog, LLP, by Patrick H. Flanagan and Meagan I. Kiser, for plaintiff-appellant.

Wake Forest University School of Law Appellate Advocacy Clinic, by John J. Korzen; and Clement Law Office, by Charles E. Clement and Charles A. Brady, III, for defendant-appellee.

GEER, Judge.

Plaintiff, the Town of Beech Mountain (the "Town"), filed two appeals arising out of a lawsuit the Town brought against defendant Genesis Wildlife Sanctuary, Inc. ("Genesis") for summary ejectment. We have consolidated the appeals for hearing and decision. On appeal, the Town first argues that the trial court erroneously granted Genesis summary judgment on the Town's summary ejectment claim. Based on our review of the record, we agree with the trial court that there is no genuine issue of material fact as to whether Genesis breached its lease.

The Town further argues that the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict ("JNOV") on Genesis' counterclaim, which alleged that a buffer zone passed as part of the Town's Buckeye Lake Protection Ordinance ("Ordinance"), as applied to Genesis, violated Genesis' substantive due process rights. Because Genesis presented substantial evidence that § 93.21(F) of the Ordinance was arbitrary and capricious as applied to Genesis, given that § 93.21(F) was designed and enforced in a manner intended to preclude Genesis from operating as a wildlife sanctuary, the trial court properly allowed the case to go to the jury. Because we also find the Town's additional arguments unpersuasive, we hold that the Town received a trial free of prejudicial error.

Facts

On 20 October 1999, the Town entered into a 30-year lease agreement with Genesis (the "Lease") for a 0.84 acre tract of land located adjacent to Buckeye Lake in Watauga County, North Carolina. Genesis, a non-profit organization incorporated for the purposes of wildlife rehabilitation and education, entered into the Lease with the Town with the express intent to house animals on the property. The Lease specifically provided, consistent with Genesis' intent: "The use of the Leased Premises is restricted to the construction, operation and maintenance of an education center that educates the general public as to how people and wildlife may peacefully co-exist. It is understood and agreed to by the parties that the Lessee may from time to time house wildlife upon the premises[.]"

Over the years from 2000 to 2006, in accordance with the Lease, Genesis built several structures on the property. A larger one, known as the "Dome," was used as an office, a residential area for volunteers, and an animal display area. Genesis also built several animal habitats on the property, including caging and fencing. Relations with the Town during this time were good, and Genesis was very successful in attracting visitors -- predominantly school groups -- from across the state, and even enthusiasts from as far away as Germany.

Starting in 2008, however, the Town became interested in using Buckeye Lake for recreational purposes, and it contacted the Department of Environment and Natural Resources ("DENR") to learn whether Buckeye Lake could be used for such purposes. Buckeye Lake serves as the Town's drinking water source and is therefore classified by DENR as a Class I reservoir subject to numerous statewide laws and regulations. At the end of 2008, Tom Boyd, Environmental Senior Specialist of

the Public Water Supply Section of DENR who had visited Buckeye Lake and Genesis' property, encouraged the Town to draft a municipal ordinance for the purposes of protecting Buckeye Lake as a public drinking source in accordance with section .1200 of the DENR's Rules Governing Public Water Supplies.

In a letter dated 18 December 2008, Boyd informed the Town he had visited Genesis' site in October 2008 and found one of its animal cages was in danger of contaminating a stream that fed into Buckeye Lake by animal waste runoff. Boyd also noted that Genesis had informed him it was planning to relocate the animal cages to a different location and maintain the tract of land for educational purposes. At this time, Genesis was in the process of moving at least some of its operations to a location known as Eagle's Nest in Banner Elk, North Carolina.

After two Town Council meetings in early 2009, the Town adopted the Buckeye Lake Protection Ordinance on 10 February 2009. In one section of the ordinance, § 93.21(F), the Town provided: "No animals can be caged or housed within 200 feet of Buckeye Lake, or within 2,000[1] feet of any stream that drains into Buckeye Lake." During the two Town Council meetings, Mayor Rick Owen and the Town Council members, when deciding on the 200-foot buffer, specifically emphasized that the 200-foot distance would cover all the structures on Genesis' property and even bar animals housed inside. Mayor Owen unambiguously stated that the intent of the Ordinance was to "eliminate [Genesis'] ability to have animals and continue to have animals at [the Buckeye Lake] facility."

The Town did not inform Genesis it had passed the Ordinance. Genesis, in May 2009, partially moved its operations to the Eagle's Nest location. However, Genesis' time at Eagle's Nest was short-lived. As a result of the lack of sewer and water at Eagle's Nest, and the bankruptcy of its financier, Genesis began moving the animals back to the Buckeye Lake location within a matter of months.

Before and after the Town passed the Ordinance, the Town experienced problems with sewage overflow from a lift station it owned and operated that was located in close proximity to Buckeye Lake. In fact, since as early as 2004 and on numerous different occasions, several hundred thousand gallons of sewage overflowed from this lift station into Buckeye Lake. Specifically, on 14 January 2010, the Town received

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1. A copy of the Ordinance in the record on appeal states "2,000 feet." However, other sources from the record, particularly the Town Council minutes, suggest the Town intended this number to be 200 feet. The distinction is not directly relevant to the issues on appeal.

a notice of violation from DENR employee Steve Tedder, indicating a sewage overflow of 147,000 gallons relating to two different incidents in December 2009.

On 24 August 2010, the Town received notification from DENR that the department had discovered pathogenic bacteria in Buckeye Lake, potentially threatening its use as a water supply. The notification also indicated that DENR believed Genesis' operation at Buckeye Lake was "in violation of the town of Beech Mountain's Buckeye Lake use Ordinance" and that "the town may be in violation of 15A NCAC 18C .1201(a) and .1202."

On 15 September 2010, the Town informed Genesis by letter that all outdoor animals and habitats, with the exception of one used for storage, had to be removed from the property within six months pursuant to a plan to comply with applicable state water safety codes. The letter threatened legal action if Genesis failed to comply.

In addition to this letter, the Town verbally enforced the terms of the Ordinance, informing Genesis that it not only had to remove all outside animals, but also had to remove all animals and cages housed inside the Dome structure. The Town falsely represented to Genesis that DENR and the State required the removal of animals and cages from the entirety of Genesis' Buckeye Lake site, including animals and cages entirely indoors. Under the threat of legal action from the State and the Town, Genesis removed all animals and cages from its Buckeye Lake facility, causing significant damage to the Dome's aesthetic structure and requiring significant effort and cost to move Genesis' operations to a new location known as "Fireweed," owned by Genesis' former president and founder, Leslie Hayhurst. Upon the relocation to Fireweed, Genesis was not permitted by the Town to host large groups as it had at Buckeye Lake, and it struggled to find a use for the Dome as it was contemplated in the Lease. Hayhurst later discovered that the Town's threats that the State would take action if they did not remove all the animals were unfounded.

On 28 March 2012, notwithstanding Genesis' efforts to comply with § 93.21(F) of the Ordinance, Genesis received a letter from the Town attorney claiming that Genesis was in breach of the Lease because, the Town claimed, (1) Genesis was using the property for purposes which violate the law and (2) Genesis was failing to "make all arrangements for repairs necessary to keep the Premises in good condition." Subsequently, the Town filed a summary ejectment action on 23 April 2012 and obtained a judgment of ejectment on 10 May 2012.

Genesis appealed to district court, moved to transfer the action to superior court, and filed multiple counterclaims, including a § 1983 claim that the Town had violated Genesis' substantive due process rights.[2] The Town and Genesis each filed motions for summary judgment on all the parties' claims and counterclaims. Genesis also filed a request for a declaratory judgment that the Ordinance be classified a zoning ordinance -- the trial court entered the requested declaratory judgment on 30 October 2013.

On 5 September 2014, the trial court granted Genesis' motion for summary judgment on the Town's breach of lease claim and also granted summary judgment in favor of the Town on Genesis' counterclaim for unfair and deceptive trade practices. Genesis voluntarily dismissed its counterclaim for violation of Article I, Section 9 of the United States Constitution. On 1 October 2014, the Town appealed the order granting Genesis' motion for summary judgment on the Town's breach of lease claim. This appeal was docketed as No. COA15-260.

Genesis' remaining counterclaims were tried on 15 September 2014. At the close of Genesis' evidence, the Town moved for a directed verdict, which the trial court granted with respect to Genesis' counterclaims asserting a Fifth Amendment taking, violation of procedural due process rights, and violation of the Contracts Clause of the United States Constitution. In addition, Genesis voluntarily dismissed its inverse condemnation and breach of lease counterclaims. The trial court denied the motion for a directed verdict with respect to Genesis' counterclaim alleging a violation of its substantive due process rights.

At the close of the Town's evidence, the Town again moved for directed verdict on the remaining substantive due process claim, which the trial court denied. The trial court then instructed the jury and commenced deliberations. During a break in the deliberations, a conversation among three jurors and a court bailiff was overheard in the courthouse stairwell concerning animal waste and trash in a lake. Once brought to the trial judge's attention, he questioned each of the jurors and invited the attorneys to ask their own questions, although none did. The jurors each indicated they could be fair and impartial. The Town moved for a

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2. After amendments to its pleadings on 8 January 2013, Genesis asserted counterclaims for violation of its substantive due process rights, breach of lease, two counts of inverse condemnation, unfair and deceptive trade practices, a Fifth Amendment takings claim, violation of Genesis' procedural due process rights, and violations of Article I, Section 10 ("Contracts" Clause) and Section 9 ("Bill of Attainder") of the United States Constitution.

mistrial, which the trial court denied, finding that the conversation did not prejudice the trial.

On 23 September 2014, the jury returned a verdict in favor of Genesis finding that the Town violated Genesis' substantive due process rights with its establishment and enforcement of § 93.21(F) of the Buckeye Lake Protection Ordinance. The jury awarded Genesis damages in the amount of $211,142.10. The trial court entered judgment on 29 September 2014 in the amount of $211,142.10 and included a declaration that the Ordinance was unconstitutional as applied to Genesis. Subsequently, the Town filed a joint motion for JNOV, to amend the verdict, and for a new trial on 3 October 2014. The trial court denied the motion on 27 October 2014. After entry of a final judgment awarding Genesis costs and attorney's fees, the Town timely appealed to this Court, resulting in the second appeal in this case, No. COA15-517.

Discussion

I. Breach of Lease

[1] The Town first appeals from the order entered by Judge Gary M. Gavenus on 5 September 2014, granting Genesis summary judgment on the Town's breach of lease claim. As an initial matter, we note that appeal No. COA15-260 was interlocutory on the date of filing because the order from which the Town appealed was "made during the pendency of an action" and did not dispose of the case. *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). At the time the Town filed this appeal, this Court lacked jurisdiction to hear the appeal because it was an improper interlocutory appeal. *See id.* at 364, 57 S.E.2d at 382-83.

However, final judgment has since been entered in this case, and the appeal is no longer interlocutory. Although we have not located any other case involving these precise circumstances, *Goodman v. Holmes & McLaurin Attorneys at Law*, 192 N.C. App. 467, 665 S.E.2d 526 (2008), is analogous. In *Goodman*, this Court refused to dismiss an appeal from an interlocutory order granting partial summary judgment after the remaining claims pending in the superior court were voluntarily dismissed. *Id.* at 471-72, 665 S.E.2d at 530. As we acknowledged in *Goodman* in language equally applicable here, "any rationale for dismissing the appeal as interlocutory fails." *Id.* at 472, 665 S.E.2d at 530. We, therefore, deem appeal No. COA15-260 properly before this Court, and we address the merits.

[2] The Town contends the trial court erred in granting summary judgment to Genesis on the Town's breach of lease claim because there are genuine issues of material fact regarding whether Genesis breached its

Lease with the Town. "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

"North Carolina's General Statutes allow for summary ejectment '[w]hen the tenant or lessee . . . has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.' " *GRE Properties Thomasville LLC v. Libertywood Nursing Ctr., Inc.*, ___ N.C. App. ___, ___, 761 S.E.2d 676, 681 (quoting N.C. Gen. Stat. § 42-46(a)(2) (2013)), *appeal dismissed and disc. review denied*, 367 N.C. 796, 766 S.E.2d 659 (2014). We note, however, that "[o]ur courts do not look with favor on lease forfeitures." *Stanley v. Harvey*, 90 N.C. App. 535, 539, 369 S.E.2d 382, 385 (1988). Furthermore, "[u]se restrictions in leases . . . will be construed against the landlord[,]" and "must be explicit and unambiguous." *Alchemy Commc'ns Corp. v. Preston Dev. Co.*, 148 N.C. App. 219, 225, 558 S.E.2d 231, 235 (2002). When a term is not defined in a lease, "it should be given its natural and ordinary meaning." *Charlotte Hous. Auth. v. Fleming*, 123 N.C. App. 511, 514, 473 S.E.2d 373, 375 (1996).

The Town first argues that genuine issues of fact remain whether Genesis violated the Lease's "Use of Property" clause by violating four Town ordinances that required Genesis to (1) screen fuel tanks on the leased property, (2) control accumulation of waste on the leased property, (3) comply with setback requirements, and (4) comply with watershed buffer requirements. The Lease's "Use of Property" clause provides: "[T]he Lessee shall not use or knowingly permit any part of the Leased Premises to be used for any purpose which violates any law." The Town argues that Genesis' alleged violations of the ordinances are violations of "any law" and, therefore, amount to a breach of the "Use of Property" clause of the Lease.

Although Genesis argues that summary judgment was proper because the Town failed to present evidence that it violated the ordinances, we do not need to reach that issue. Reading the "Use of Property" clause in accordance with its "natural and ordinary meaning," as required by *Charlotte Housing Authority*, *id.*, the plain language of the clause only prohibits Genesis from *using* the leased property *for an illegal purpose*. Thus, even if the Town could show that Genesis had violated the ordinances, it still would not have shown that Genesis' purpose in using the property was illegal. Indeed, it is undisputed that Genesis has used the property for the purpose of constructing, operating, and

maintaining a wildlife refuge and educational center, which not only is a purpose that does not violate any law, but also is the precise use authorized by the Lease. Accordingly, there are no genuine issues of material fact regarding whether Genesis was in breach of the Lease by violating the "Use of Property" clause.

The dissent contends that we "read[] the Lease provision far too narrowly." This argument and the dissent's construction of the provision, which construes the "Use of Property" clause in the light most favorable to the Town, run counter to the mandate in *Alchemy Commc'ns Corp.*, 148 N.C. App. at 225, 558 S.E.2d at 235, that use restrictions in leases "will be construed against the landlord" and "must be explicit and unambiguous." While the Lease provides that Genesis "shall not use . . . any part of the Leased Premises . . . for *any purpose* which violates any law" (emphasis added), the dissent would amend the provision to read that Genesis "shall not use . . . any part of the Leased Premises . . . *in any way* which violates any law." The dissent cites no authority that authorizes such a broad construction of a lease in favor of a landlord seeking to eject its tenant. At a minimum, the dissent shows that the "Use of Property" clause is not explicit and unambiguous and, therefore, cannot be a basis for ejecting Genesis.

[3] The Town also asserts genuine issues of fact remain regarding whether Genesis breached the "Repairs" clause, which required Genesis to "make all arrangements for repairs necessary to keep the Leased Premises in good condition. This includes repairs for any and all damage caused by the Lessee, its agents and/or its invitees." In the event of Genesis' default, and its subsequent failure to cure the default within 10 days of notice of its default, the Town had the option of terminating the Lease.

In support of this argument, the Town relies on pictures it claims were taken by Town Manager Randy Feierabend on 11 April 2012 and attached to his affidavit, showing natural and artificial debris on the leased premises. The Town claims that Genesis had not removed this debris as of 31 May 2012. The Town, therefore, argues that Genesis was in breach of the "Repairs" clause and the Lease because it failed to remedy the debris within 10 days of notice from the Town.

Genesis argues that after the Town complained of this debris in a 29 March 2012 letter, Genesis' president, Leslie Hayhurst, replied in a 2 April 2012 letter that defendant was in "an on-going effort to 'clean up' in and around the remaining structures and to recondition and refurbish" the property. The letter further indicated that this cleanup

effort could only be completed once the animals were removed from the property, as the Town had demanded, and once the weather permitted. Genesis presented uncontroverted evidence that winter storms had produced tree damage and debris and that as of February 2012 -- well before the Town had even provided notice of the potential default -- Genesis was actively engaged in removing the debris with help from volunteers.

Following the principle in *Stanley* that we "do not look with favor on lease forfeitures," 90 N.C. App. at 539, 369 S.E.2d at 385, and giving the "Repairs" and default clauses their plain and ordinary meaning, we hold that the Town has not shown that there is an issue of fact regarding whether Genesis, as required by the Repairs clause, had made "all arrangements for repairs necessary to keep the Premises in good condition" within 10 days after the Town gave notice of the need for action. The Town has not presented any basis for concluding that the Lease required that Genesis complete its cleanup efforts 10 days after receiving notice of the debris from the Town in its 29 March 2012 letter.

Moreover, while the Town asserts on appeal that Genesis still had not remedied the violation by 31 May 2012, the Town can point to no evidence supporting that claim. Finally, while the Town Manager claimed that the photos on which the Town has relied almost entirely for proving breach of the Repairs clause were taken on 11 April 2012, Genesis has made a compelling showing that the Town Manager's statement regarding the date of the photos was untrue and that the photos were actually taken in March. Whether the date of the photos is true or not is, however, immaterial since the Town failed to show that Genesis had not, in violation of the Lease, made the necessary arrangements to keep the property in good condition.

Accordingly, we agree with the trial court that the Town has failed to show that a genuine issue of material fact exists as to whether Genesis breached the Lease. The trial court, therefore, properly granted summary judgment on the Town's claims of breach of the Lease.

II. Admission of Evidence at Trial of Town's Sewage Spills

[4] The Town next challenges the trial court's admission at trial of evidence of sewage spills into Buckeye Lake coming from the Town's lift station and the corresponding notices of violation that the Town received from DENR for the sewage overflows. The Town argues this evidence was both irrelevant and unfairly prejudicial and that the trial court not only erred in admitting the evidence, but also should have granted the Town's motion for a new trial based on the admission of that evidence. We disagree.

The Town points to the testimony of Susan Halliburton, a former Genesis board member and Town resident, about the sewage overflows and notices of violation from the State. The Town objected generally to the testimony on the grounds of relevancy. In overruling the Town's objections based on relevancy, the trial court noted, "But they have to show that that was arbitrary, capricious and all that. And if you're totally polluting this lake another way . . . doesn't that add to the absurdity of the 200-foot buffer?"

However, two other witnesses also testified about the sewage overflows, without objection, including Steve Tedder, a former DENR water quality supervisor. Mr. Tedder testified that thousands of gallons of "human waste" flowed into Buckeye Lake and that he personally signed and sent to the Town "a notice of violation for two different spills" in 2010 for "a total of 147,000 gallons of human waste going into Buckeye Lake."

It is well established that "[h]aving once allowed this evidence to come in without objection, the [Town] waived [its] objections to the evidence and lost the benefit of later objections to the same evidence." *State v. Burnett*, 39 N.C. App. 605, 610, 251 S.E.2d 717, 720 (1979). Thus, even if the evidence of the Town's contamination of the lake with human waste was irrelevant or unfairly prejudicial, the Town failed to preserve this error for appeal. *See also Lowery v. Newton*, 52 N.C. App. 234, 242, 278 S.E.2d 566, 572 (1981) ("Assuming such testimony was hearsay and unresponsive, it is harmless in view of the fact that the record discloses that similar testimony occurs elsewhere.").

Moreover, when a party has moved for a new trial pursuant to Rule 59(a)(8) of the Rules of Civil Procedure, a new trial may be granted where there is an "[e]rror in law occurring at the trial *and objected to by the party making the motion*[.]" (Emphasis added.) Because the Town did not object to each admission of evidence of the sewage overflow, this issue has not been properly preserved and any error in denying the motion for a new trial because of the admission of Ms. Halliburton's testimony would be harmless. *See Borg-Warner Acceptance Corp. v. Johnston*, 107 N.C. App. 174, 183, 419 S.E.2d 195, 200 (1992) (rejecting as unpreserved challenge to denial of motion for new trial based on admission of evidence that appellant had not objected to at trial).

Regardless, it is a general principal that "[e]vidence is relevant if it has any logical tendency to prove a fact at issue in a case[.]" *State v. Arnold*, 284 N.C. 41, 47, 199 S.E.2d 423, 427 (1973). "It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the

parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *Id.* at 47-48, 199 S.E.2d at 427.

The trial court concluded, and we agree, that evidence of the Town's sewage overflows is relevant to whether the Town's Buckeye Lake Ordinance was arbitrary and capricious, a fact Genesis was required to prove for its substantive due process claim. More specifically, in accordance with *Arnold*, evidence that the Town's own negligence was causing the contamination in Buckeye Lake speaks to the Town's "conduct or motives" and the "general circumstances surrounding the parties" in adopting a 200-foot buffer zone preventing the caging and housing of animals. *Id.* In other words, it raises questions of fact whether the 200-foot buffer zone designed to eliminate the presence of all animals -- indoors and out -- at the Genesis wildlife refuge would have any appreciable effect on Buckeye Lake's water quality when the Town itself was the source of more than 100,000 gallons of sewage spilling into the lake during the time frame of the adoption of the buffer. This evidence questions the purpose of the buffer zone, which speaks to whether § 93.21(F) of the Ordinance was arbitrary or capricious. Thus, we hold that the trial court did not err in admitting the evidence as relevant.

The Town also argues that the prejudice outweighed any benefit of admission of the evidence, apparently an argument for exclusion under Rule 403 of the Rules of Evidence, although the Town does not cite Rule 403. Nonetheless, the Town failed to object to the evidence on this basis at trial and, therefore, did not preserve this issue for appeal. *State v. Hueto*, 195 N.C. App. 67, 71, 671 S.E.2d 62, 65 (2009).

III. Denial of Motions for Directed Verdict and JNOV

The Town next challenges the denial of its motions for a directed verdict and JNOV pursuant to Rule 50 of the Rules of Civil Procedure. " 'The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical. We must determine whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury.' " *Springs v. City of Charlotte*, 209 N.C. App. 271, 274-75, 704 S.E.2d 319, 322-23 (2011) (quoting *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009)). " 'A motion for either a directed verdict or JNOV should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's

claim.' " *Id.* at 275, 704 S.E.2d at 323 (quoting *Shelton*, 197 N.C. App. at 410, 677 S.E.2d at 491).

A. Preclusion of Claims Brought Under 42 U.S.C. § 1983

[5] First, the Town argues that Genesis was precluded from bringing a § 1983 claim for violation of its substantive due process rights because it had an adequate post-deprivation state law remedy of inverse condemnation. As the United States Supreme Court has explained, there are three variations of claims brought under the Due Process Clause of the Fourteenth Amendment:

> First, the Clause incorporates many of the specific protections defined in the Bill of Rights. . . . [*E.*]*g.*, freedom of speech or freedom from unreasonable searches and seizures. Second, the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. *As to these two types of claims, the constitutional violation actionable under § 1983 is complete when the wrongful action is taken. A plaintiff . . . may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.*
>
> The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure. . . . The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.

Zinermon v. Burch, 494 U.S. 113, 125-26, 108 L. Ed. 2d 100, 113-14, 110 S. Ct. 975, 983 (1990) (emphasis added) (internal citations and quotation marks omitted)).

Thus, for substantive due process claims, " '[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.' " *Id.* at 124, 108 L. Ed. 2d at 113, 110 S. Ct. at 982 (quoting *Monroe v. Pape*, 365 U.S. 167, 183, 5 L. Ed. 2d 492, 503, 81 S. Ct. 473, 482 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)).

While we are first and foremost bound by this decision of the United States Supreme Court, *Pender Cnty. v. Bartlett*, 361 N.C. 491, 516, 649 S.E.2d 364, 380 (2007), *aff'd*, 556 U.S. 1, 173 L. Ed. 2d 173, 129 S. Ct. 1231 (2009), our Supreme Court has also reached the same conclusion in *Edward Valves, Inc. v. Wake Cnty.*, 343 N.C. 426, 434, 471 S.E.2d 342, 347 (1996), where it held specifically that "[s]tate remedies are only relevant when a Section 1983 action is brought for a violation of procedural due process." This Court has recently held the same. *See Swan Beach Corolla, L.L.C. v. Cnty. of Currituck*, 234 N.C. App. 617, 629, 760 S.E.2d 302, 312 (2014) ("While [§ 1983] claims for violation of procedural due process may be subject to exhaustion requirements, substantive constitutional claims are not[.]" (internal citation omitted)).

Despite this precedent, the Town claims that as a matter of law, Genesis is precluded from bringing this claim because North Carolina's inverse condemnation statutes provide an adequate remedy. In asserting this position, the Town cites to numerous federal cases. However, even apart from *Zinermon*, we are required to follow the precedents established in *Edward Valves* and *Swan Beach Corolla*. Accordingly, we hold Genesis' substantive due process claim is not barred by Genesis' ability to bring an inverse condemnation action.

B. As-Applied Substantive Due Process Violations

[6] Secondly, the Town contends that the adoption and enforcement of § 93.21(F) of the Ordinance did not violate Genesis' substantive due process rights because the Ordinance was not an arbitrary and capricious exercise of its municipal police power and was, therefore, rationally related to the legitimate government interest in protecting the Town's water supply. In making this argument, the Town fails to recognize that Genesis brought an "as applied" claim rather than attacking the facial validity of the Ordinance.

" 'In general, substantive due process protects the public from government action that [1] unreasonably deprives them of [2] a liberty or property interest.' " *Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 63, 698 S.E.2d 404, 422 (2010) (quoting *Toomer v. Garrett*, 155 N.C. App. 462, 469, 574 S.E.2d 76, 84 (2002)), *aff'd per curiam*, 365 N.C. 305, 716 S.E.2d 849 (2011). "[S]ubstantive due process denotes a standard of reasonableness and limits a state's exercise of its police power. . . . 'The traditional substantive due process test has been that a statute must have a rational relation to a valid state objective.' " *Beneficial N.C., Inc. v. State ex rel. N.C. State Banking Comm'n*, 126 N.C. App. 117, 127, 484 S.E.2d 808, 814 (1997) (quoting *In re Petition of Kermit Smith*, 82 N.C. App. 107, 111, 345 S.E.2d 423, 425-26 (1986)).

In arguing that its motion for a directed verdict and motion for JNOV should have been granted, the Town relies upon the principles that unless a municipal ordinance is clearly prohibited by the Constitution, appellate courts presume it is constitutional and, quoting *Patmore v. Town of Chapel Hill*, 233 N.C. App. 133, 140, 757 S.E.2d 302, 306 (quoting *Graham v. City of Raleigh*, 55 N.C. App. 107, 110, 284 S.E.2d 742, 744 (1981)), *disc. rev. denied sub nom. Patmore v. Town of Chapel Hill*, 367 N.C. 519, 758 S.E.2d 874 (2014), that " '[w]hen the most that can be said against [zoning] ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere.' " The Town asserts that "a constitutional violation exists only when the challenged governmental action does *not bear a rational relationship to a legitimate governmental objective*." (Emphasis original.)

In making this argument, the Town has addressed only a facial challenge to an ordinance. However, there is a difference between a challenge to the facial validity of an ordinance as opposed to a challenge to the ordinance as applied to a specific party. "The basic distinction is that an as-applied challenge represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context." *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999). "In an as-applied case, the plaintiff is contending that the defendant municipal agency violated his or her constitutional rights in the manner in which an ordinance was applied to his or her property." *Cornell Cos., Inc. v. Borough of New Morgan*, 512 F. Supp. 2d 238, 256 (E.D. Pa. 2007). "[O]nly in as-applied challenges are facts surrounding the plaintiff's particular circumstances relevant." *Frye*, 109 F. Supp. 2d at 439.

We have found no prior North Carolina precedent addressing an as-applied substantive due process claim under circumstances similar to those here. However, the Fourth Circuit has held that "[t]o establish a violation of substantive due process, [a plaintiff] must demonstrate (1) that they had property or a property interest; (2) that the state deprived them of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency." *MLC Auto., LLC v. Town of S. Pines*, 532 F.3d 269, 281 (4th Cir. 2008) (internal quotation marks omitted). "And in the context of a zoning action involving property, it must be clear that the state's action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation

to the public health, the public morals, the public safety or the public welfare in its proper sense.' " *Id.* (quoting *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88, 72 L. Ed. 842, 844, 48 S. Ct. 447, 448 (1928)). Further, "[i]n making this determination we may consider, among other factors, whether: (1) the zoning decision is tainted with fundamental procedural irregularity; (2) the action is targeted at a single party; and (3) the action deviates from or is inconsistent with regular practice." *Id.*

With particular emphasis on the second factor, it is clear that "government actors cannot single out a particular individual or entity for disparate treatment based on illegitimate, political or personal motives." *Browning-Ferris Indus. of S. Atl., Inc. v. Wake Cnty.*, 905 F. Supp. 312, 321 (E.D.N.C. 1995). *See also Marks v. City of Chesapeake, Va.*, 883 F.2d 308, 311 (4th Cir. 1989) (" 'Such purposeful discrimination against a particular individual . . . violate[s] the Constitution *even where no recognized class-based or invidious discrimination was involved*.' " (quoting *Scott v. Greenville Cnty.*, 716 F.2d 1409, 1420 (4th Cir. 1983)); *Scott*, 716 F.2d at 1420 (holding plaintiff presented sufficient evidence of due process violation when "it appear[ed] that the moratorium was directed solely" at plaintiff because municipal agency's "moratorium on building permits was limited to the area in which [plaintiff] proposed to build, and that his was the only application pending in that area"); *Doctor John's, Inc. v. City of Sioux City*, 438 F. Supp. 2d 1005, 1035 (N.D. Iowa 2006) (holding evidence that city "systematically targeted [plaintiff] for exclusion and has amended its ordinances for that purpose" sufficient "to generate genuine issues of material fact" regarding due process claim).

The Town's arguments at trial and on appeal focus on its contention that the Ordinance's prohibition of caged and housed animals within 200-feet of Buckeye Lake or any stream that drains into it was rationally related to the legitimate interest of protecting the Town's water supply. Specifically, the Town contends that it adopted § 93.21(F) of the Ordinance in response to pressure from DENR to comply with Title 15A, Chapter 18 of the North Carolina Administrative Code, which requires, among other things, that "[p]recautions shall be taken on the watershed of class I and class II reservoirs . . . to control the drainage of wastes from animal and poultry pens or lots, into such sources." 15A N.C. Admin. Code 18C.1208 (2014). The Town further argues that the eventual adoption of the 200-foot buffer zone was reasonable given the expert testimony of Lee Spencer, a former Regional Engineer of the Public Water Supply Section of DENR, who testified that 200 feet was a common buffer distance for other drinking water reservoirs in the state.

These arguments, found persuasive by the dissent as well, focus, however, on the facial validity of the Ordinance and do not address the "facts surrounding the plaintiff's particular circumstances," *Frye*, 109 F. Supp. 2d at 439, whether the Town's actions in adopting and enforcing the Ordinance lacked a substantial relationship to its interest in protecting the Town's water supply, or whether these actions "singl[ed] out [Genesis] for disparate treatment based on illegitimate, political or personal motives." *Browning-Ferris Indus.*, 905 F. Supp. at 321. Indeed, the Town acknowledges, referencing a letter dated 18 December 2008 from Tom Boyd, "it is clear that the Town's enactment of Section 93.21(f) was in response to NCDENR's actual notice to the Town that the conditions at Genesis 'could be a serious health concern and needs to be addressed.' "

The dissent, however, expands on the Town's arguments and asserts that Genesis' evidence that the Town targeted it when adopting and enforcing § 93.21(F) cannot, in any event, give rise to an as-applied substantive due process claim. In support of this position, however, the dissent relies on First Amendment decisions, which apply an analysis that has no relevance to a substantive due process claim.

Each of the First Amendment decisions cited by the dissent addresses the issue whether the challenged statute or ordinance was content based or content neutral and held that when the legislation was valid on its face -- in other words, was facially content neutral -- mere allegations or hypotheses of a content-based motive for the legislation would not be sufficient to trigger strict scrutiny of the legislation under the First Amendment.

These decisions arising in the specialized context of the First Amendment are immaterial to the issues in this case. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 645, 652, 129 L. Ed. 2d 497, 520, 524, 114 S. Ct. 2445, 2461, 2464 (1994) (while noting that "even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys[,]" nevertheless holding that "[a]ppellants' ability to *hypothesize* a content-based purpose for these provisions *rests on little more than speculation* and does not cast doubt upon the content-neutral character of" challenged regulations (emphasis added)); *United States v. O'Brien*, 391 U.S. 367, 382-83, 20 L. Ed. 2d 672, 683, 88 S. Ct. 1673, 1682 (1968) (concluding that legislation regulated conduct and was content neutral with respect to speech and rejecting defendant's claim that Congress still had "purpose" of suppressing speech because "an otherwise constitutional statute" will not be struck down "on the basis of an *alleged* illicit legislative motive"

(emphasis added)); *D.G. Rest. Corp. v. City of Myrtle Beach*, 953 F.2d 140, 146, 147 (4th Cir. 1991) (holding that because "the record discloses no evidence to support a conclusion that [the communicative] message [of nude dancing] was the target of the Myrtle Beach ordinance[,]" ordinance was content neutral "valid time, place, and manner restriction" for purposes of First Amendment); *Cricket Store 17, LLC v. City of Columbia*, 97 F. Supp. 3d 737, 745, 746 (D.S.C. 2015) (holding that ordinances restricting where sexually-oriented business can be located are valid, content neutral "time, place, and manner regulations" for First Amendment purposes and evidence that adoption of ordinance was "spurred" by opening of sexually-oriented business "is not controlling, as this does not demonstrate that a ban on [plaintiff's] erotic message was a motive for the ordinances").[3]

Under the applicable substantive due process analytical framework set out in *MLC*, in order to decide whether the Ordinance is an arbitrary or irrational exercise of power having no true substantial relation " 'to the public health, the public morals, the public safety or the public welfare in its proper sense[,]' " 532 F.3d at 281 (quoting *Nectow*, 277 U.S. at 187-88, 72 L. Ed. at 844, 48 S. Ct. at 448), we first look at whether "the zoning decision is tainted with fundamental procedural irregularity[.]" *Id.* On this factor, Mr. Spencer, the Town's expert witness formerly employed by DENR, testified that before a buffer is applied to an individual's property, science should be "applied in some fashion" to determine the proper distance for that buffer and that a municipality should not pass an ordinance without consulting the only property owner it will affect.

Genesis presented evidence that the buffer was not based on science or even a recommendation by DENR. Although the Town argues that it adopted the Ordinance in response to pressure from DENR, both of the Town's witnesses admitted that DENR never specifically required a 200-foot buffer. The Town Council meeting minutes for 13 January 2009 and 10 February 2009 evidenced how the Town in fact came up with the 200-foot buffer.

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3. The dissent also mistakenly relies on *Waste Indus. USA, Inc. v. State*, 220 N.C. App. 163, 725 S.E.2d 875 (2012), a case addressing discrimination under the Commerce Clause, and asserts that this Court held that a buffer and size restriction "for landfills was constitutional even though *the purpose* of the legislation may have been to prevent a particular company from constructing certain landfills near our coast." This Court actually held that "we have concluded that plaintiffs *failed to present evidence* giving rise to an issue of fact regarding the purpose of the legislation" being to prevent the construction of the particular landfills. *Id.* at 180, 725 S.E.2d at 887 (emphasis added).

The discussion at the 13 January meeting progressed from simply preventing caging of animals in Buckeye Creek's floodplain to preventing it within 200 feet of the lake or any stream that feeds into Buckeye Lake, which was admittedly "more stringent." The minutes reveal that the rationale for this "more stringent" 200-foot requirement was solely an intent to "eliminate [Genesis'] ability to have animals and continue to have animals at that facility." Indeed, in discussing the size of the buffer, one Town council member pointed out, "I don't think 100 feet will [go beyond Genesis' buildings], but I think 200 feet will."

In addition, contrary to the proper procedure identified by Mr. Spencer, the Town did not consult with Genesis, the property owner that was the target of this part of § 93.21(F), prior to adopting the Ordinance. In fact, Genesis presented evidence that the Town did not even notify Genesis of the passage of the Ordinance. Instead, on 15 September 2010, more than a year after the passage of the Ordinance, the Town informed Genesis by letter that all outdoor animals and habitats, with the exception of one used for storage, had to be removed from the property within six months pursuant to a plan to comply with applicable *state water safety codes*. The letter threatened legal action if Genesis failed to comply. The Town then, orally, falsely represented to Genesis that DENR required the removal of animals and cages from the entirety of Genesis' Buckeye Lake site, including animals and cages entirely inside, and that the State would take legal action if Genesis failed to comply.

Thus, Genesis presented evidence meeting the first *MLC* factor. Contrary to proper procedure for the adoption of this kind of Ordinance, as established by the Town's own expert, the Town did not base its 200-foot buffer on any kind of science, but rather chose the buffer because it was the distance necessary to eliminate Genesis' ability to function consistent with the purposes set out in its Lease with the Town. Further, the Town did not consult with Genesis prior to adopting the Ordinance, even though this aspect of the Ordinance was directed at the property Genesis leased from the Town.

Genesis also presented substantial evidence regarding the second *MLC* factor: § 93.21(F) of the Ordinance provision was targeted at a single party, Genesis. In addition to the evidence relevant to the first factor, at the 10 February 2010 Town meeting, Mayor Owen stated: "There is one item that we were in particular wanting to be sure it was worded properly, and it's a reference to animals, caging and housing of animals around Buckeye Lake . . . . It will have an effect on Genesis Wildlife." In addition, the former Town attorney, David Paletta, in explaining the use of the word "housed" in the Ordinance's requirement that "[n]o animals

can be caged or housed within" the buffer, reflected that Genesis was the target of that provision: "Well, basically what I'm trying to do, is I understand the Council is concerned about some caging of animals that the Council would like to get rid of . . . ."

Genesis likewise presented substantial evidence relating to the third *MLC* factor: the action deviates from or is inconsistent with regular practice. In this case, this factor overlaps with the first factor. In addition to evidence that the Town in fact arbitrarily selected a 200-foot buffer in order to ensure removal of all of Genesis' facilities for animals, the Town's utilities director, Robert Heaton, indicated that the Town had not performed any investigation or study in creating the 200-foot buffer, and he could not provide any rationale as to why the Town adopted that specific buffer distance or why it had included "housed" animals. Mr. Heaton also acknowledged that the animals housed inside Genesis' Dome did not create a danger to Buckeye Lake.

Even though, as Genesis' evidence showed, the Town told Genesis that DENR was threatening legal action unless all of Genesis' animals were removed from the Buckeye Lake facility, Mr. Spencer testified that DENR's only concern with Genesis' operation was a "wolf habitat" that "should be removed" if Genesis were to stay at its Buckeye Lake site. Neither of the Town's two witnesses -- the only testimony it presented -- provided any explanation how the prohibition of "housed" animals was reasonable or related to the Town's interest in protecting the Town's drinking water when the only concern was with Genesis' open air cages "located in close proximity to a small branch that discharges into [Buckeye Lake]."

In sum, Genesis presented evidence supporting the existence of each of the *MLC* factors. In *MLC*, the Fourth Circuit concluded that comparable evidence was "sufficient to survive summary judgment" on the property owner's substantive due process claim. 532 F.3d at 282. When the evidence was taken in the light most favorable to the property owner -- which was precluded from building a car dealership when the defendant town rezoned its property -- the court concluded that the evidence "satisfie[d] all three relevant factors." *Id.* The evidence showed that "the zoning decision was procedurally irregular in that it occurred without any reference to the comprehensive plan; [the property owner] was singled out for treatment; and the zoning was made without any studies and at the behest of a citizen petition, the first such petition in the Town since at least 1989." *Id.* In addition, apart from the three factors, "the record evidence at least suggests that citizenry opposition was based not upon legitimate land use issues but upon dislike of car

dealerships. Statements such as '[l]ipstick on a pig does not change the nature of the beast,' . . . do not relate to legitimate land use concern but rather to the very arbitrary exercise of power the due process clause is intended to protect against." *Id.*

Likewise, here, in addition to evidence addressing the three *MLC* factors, Genesis also presented other evidence that would allow a jury to conclude that the adoption of the Ordinance did not relate to a legitimate concern with the safety of the Town's water supply. Leslie Hayhurst and Susan Halliburton testified that the Town began enforcing the Ordinance in the fall of 2010 with the false threat of legal action from the State. This evidence in particular raises questions of fact whether the Town's motives in passing this Ordinance were truly to protect the Town's drinking water or simply to interfere with Genesis' interest in its leased property. Such improper motives were the basis for the trial court granting summary judgment in favor of the plaintiff's substantive due process claim in *Browning-Ferris*, 905 F. Supp. at 321.

In addition, evidence of the Town's own sewage problems and its manner of enforcing § 93.21(F) of the Ordinance also raises issues of fact regarding the Town's improper motives in adopting an ordinance directed solely at Genesis. As we have noted above, Ms. Halliburton and Mr. Tedder testified extensively about the Town's sewage overflows. This evidence is particularly relevant here because if the Town was responsible for much of the contaminants in Buckeye Lake, and was receiving pressure from DENR to ameliorate those problems, then a jury could conclude that the motivation behind § 93.21(F), directed at removal of Genesis' facility, was not for the purpose of maintaining drinking water safety.

In sum, the evidence presented at trial was sufficient to create genuine issues of fact whether the motives of the Town and the purposes behind the 200-foot buffer -- that prohibited both outdoor and indoor animals -- were related to the legitimate interest of protecting the Town's water supply or were to prevent Genesis from using their property for the purposes set forth in their 30-year Lease with the Town. Accordingly, we hold the trial court's denial of the Town's motions for directed verdict and JNOV were not in error.

IV. The Town's Motion for New Trial based on Jury Misconduct

[7] The Town next argues the trial court erred in denying the Town's motion for a new trial pursuant to Rule 59 of the Rules of Civil Procedure based on jury misconduct. During a break in jury deliberations, three

jurors and a court bailiff discussed in the courthouse hallway, generally, the harms of animal waste in bodies of water. The bailiff knew one of the jurors personally and also knew that he was a juror. After the trial judge was informed of this potential impropriety, he individually questioned each juror and the bailiff regarding the conversation. The trial judge learned that the conversation related to a juror's distress on learning of the pollution in Buckeye Lake because he had been eating fish from the lake his entire life. The bailiff suggested to the juror that the risk of animal waste in a small body of water was not significant because he grew up on a dairy farm and knew of someone who consumed fish from a stream on his property adjacent to livestock.

At the conclusion of the trial judge's questioning of each involved juror, the jurors each affirmed to the judge that they could be fair and impartial despite this conversation. Although attorneys from both sides were given the opportunity to also question each juror, no attorney did so. Ultimately, the trial court found that "the subject matter is of such a nature that it does not directly relate to the issues in which the jury is considering for purposes of deliberation in this matter" and that "[a]s a result thereof, . . . the conversation does not prejudice the trial in any respects, does not have any affect [sic] on the jurors and their ability to be fair and impartial in their deliberations in this matter[.]"

"When juror misconduct is alleged, it is the trial court's responsibility 'to make such investigations as may be appropriate, including examination of jurors when warranted, to determine whether misconduct has occurred and, if so, whether such conduct has resulted in prejudice to the [aggrieved party].' " *State v. Salentine*, ___ N.C. App. ___, ___, 763 S.E.2d 800, 804 (2014) (quoting *State v. Aldridge*, 139 N.C. App. 706, 712, 534 S.E.2d 629, 634 (2000)), *disc. review denied*, ___ N.C. ___, 771 S.E.2d 308 (2015). "On appeal, we give great weight to [the trial court's] determinations whether juror misconduct has occurred and, if so, whether to declare a mistrial. Its decision should only be overturned where the error is so serious that it substantially and irreparably prejudiced the defendant, making a fair and impartial verdict impossible." *Id.* at ___, 763 S.E.2d at 804 (internal citation and quotation marks omitted).

The Town argues that this Court *is required* to apply a seven-factor test in analyzing whether juror misconduct creates a prejudicial effect on a party requiring a new trial pursuant to the Supreme Court's decision in *Stone v. Griffin Baking Co. of Greensboro, Inc.*, 257 N.C. 103, 107-08, 125 S.E.2d 363, 366 (1962). Some of these factors include whether the non-juror had any relationship to the jurors, whether the non-juror knew

of a juror's status as a juror, whether the conversation referenced the case, whether there was any intent to influence the jurors, and whether there was any prejudicial influence. *Id.* Although these factors may be relevant to the overall inquiry, we do not agree with the Town's contention that our Supreme Court mandated such a seven-factor test in *Stone*. In the years since *Stone*, our Supreme Court has never suggested that *Stone* created such a test. *See, e.g.*, *State v. Sneeden*, 274 N.C. 498, 504, 164 S.E.2d 190, 195 (1968) (noting that *Stone* adopted general rule: " '[N]either the common law nor statutes contemplate as ground for a new trial a conversation between a juror and a third person unless it is of such a character as is calculated to impress the case upon the mind of the juror in a different aspect than was presented by the evidence in the courtroom, or is of such a nature as is calculated to result in harm to a party on trial. The matter is one resting largely within the discretion of the trial judge.' " (quoting 39 Am. Jur., *New Trial*, § 101)).

We hold, under the standard set out in *Salentine*, that the trial judge took the appropriate actions to investigate the conversation between the jurors and bailiff. Furthermore, we find his questions generally addressed the concerns noted in *Stone*. The trial judge received an assurance from each juror that they were not prejudiced by the conversation with the bailiff, allowed each party's attorneys to question the jurors, and explained orally that the conversation regarding sewage in bodies of water did not directly relate to or influence the jury's deliberations. Because we find the conversation did not affect "the fairness of the trial or the integrity of the verdict[,]" the trial judge did not abuse his discretion in refusing to grant a mistrial. *Sneeden*, 274 N.C. at 505, 164 S.E.2d at 195.

V. Motion to Amend the Verdict

The Town next argues that the trial court erred by denying the Town's motion to amend the jury verdict pursuant to Rule 59 because (1) the jury awarded Genesis a double recovery for both repair and replacement damages and (2) the amount awarded was in excess of any actual damages proven at trial. We disagree.

A. Double Recovery

[8] It is a general principle that " '[t]he measure of damages used should further the purpose of awarding damages, which is to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money.' " *Coley v. Champion Home Builders Co.*, 162 N.C. App. 163, 166, 590 S.E.2d 20, 22 (2004) (quoting *Bernard v. Cent. Carolina Truck Sales*, 68 N.C. App. 228, 233, 314 S.E.2d

582, 585 (1984)). "North Carolina is committed to the general rule that the measure of damages for injury to personal property is the difference between the market value of the damaged property immediately before and immediately after the injury. . . . [T]he cost of repairs is some evidence of the extent of the damage." *Carolina Power & Light Co. v. Paul*, 261 N.C. 710, 710-11, 136 S.E.2d 103, 104 (1964).

The Town argues the costs to rebuild the cages at the Buckeye Lake location duplicated the costs to reestablish Genesis' operations at the Fireweed location and, therefore, Genesis should not be placed in a better position than before the alleged harm. The Town cites to *Sprinkle v. N.C. Wildlife Res. Comm'n*, 165 N.C. App. 721, 728, 600 S.E.2d 473, 478 (2004), for the proposition that a claimant cannot receive double recovery for "the difference in value before repair, plus the cost of repair." We find this case is inapposite to the facts here.

In *Sprinkle*, this Court found the owner of a damaged boat was precluded from recovering two different measures of value for the same property. *Id.* To the contrary, here, the evidence shows separate and distinct costs to Genesis resulting from the Town's arbitrary and capricious actions: (1) the costs to reconstruct animal cages at the Fireweed location when required by the Town to relocate the animals, and (2) further costs to restore Genesis' operations at the Buckeye Lake location after Genesis was allowed to return the animals to the original location.

Ms. Halliburton testified to these different costs. She explained that Genesis incurred costs in the amount of approximately $171,000.00 to move the animals and its operations to the Fireweed location, where it would not be able to operate and maintain "an education center" in the same manner that it had at the Buckeye Lake location pursuant to the terms of the Lease. Specifically, Ms. Halliburton stated, "Fireweed was not officially Genesis, but it was more or less our little satellite hospital. . . . [T]he town stipulated we could not have the public there as Genesis." Thus, the Town's arbitrary and capricious enforcement and enactment of the Ordinance prevented Genesis from operating as provided under the terms of the Lease.

Ms. Halliburton further testified to costs in the amount of $14,373.84 incurred in repairing the damage to the Dome at the Buckeye Lake location resulting from the Town's enforcement of the Ordinance. She claimed that in an attempt to make the Dome location an educational center, as was required by the terms of the Lease, Genesis had to repair a "pretty sad" interior resulting from Genesis having "to tear out the cages that were inside" pursuant to the Town's mandate.

Finally, David Shook, the contractor who quoted Genesis the cost of materials needed to restore the animal cages at its Buckeye Lake site and thus to restore Genesis' property interest pursuant to the Lease, testified to costs of approximately $91,000.00. Thus, Genesis incurred different damages as a result of different effects produced by the Town's enactment and enforcement of the Ordinance. Accordingly, the trial court did not err in denying the Town's Rule 59 motion to amend the amount of damages on account of a double recovery.

B. Proof of Actual Damages

[9] We next examine the Town's argument that the trial court abused its discretion in denying the Town's motion for an amended verdict because the jury's award exceeded actual damages proven at trial. "The party seeking damages bears the burden of proving them in a manner that allows the fact-finder to calculate the amount of damages to a reasonable certainty. While the claiming party must present relevant data providing a basis for a reasonable estimate, proof to an absolute mathematical certainty is not required." *State Props., LLC v. Ray*, 155 N.C. App. 65, 76, 574 S.E.2d 180, 188 (2002) (internal citation omitted). Furthermore, where "it is unclear exactly how the jury reached its overall figure," the trial court does not abuse its discretion in denying a motion to amend the verdict if "the jury's verdict was consistent with [the claimant's] evidence[.]" *Blakeley v. Town of Taylortown*, 233 N.C. App. 441, 449, 756 S.E.2d 878, 884, *disc. review denied*, 367 N.C. 521, 762 S.E.2d 208 (2014).

Here, although it is unclear exactly how the jury reached a verdict of $211,142.10, there is no indication that this amount is inconsistent with the evidence presented at trial. Ms. Halliburton and Mr. Shook testified to damages totaling $276,824.92, which Genesis provided to the jury in a spreadsheet. Although the Town did not present any evidence to challenge the damages presented on these spreadsheets, cross-examination of Ms. Halliburton revealed that the labor costs on the spreadsheet were from unpaid volunteers and that a number of other costs on the spreadsheet resulted from donations. These amounts totaled just over $65,000.00. A simple subtraction of the volunteered labor and material in the approximate amount of $65,000.00 from the $276,824.92 in total damages reveals an amount consistent with the jury's verdict of $211,142.10. Thus, even though we cannot be sure exactly how the jury calculated its verdict, or that the verdict was calculated with mathematical certainty, we find the verdict is consistent with the evidence presented by Genesis. Therefore, the trial court did not abuse its discretion in denying the Town's motion to amend the jury verdict.

VI. Declaratory Judgments

As a final matter, the Town argues that the trial court erred by entering a declaratory judgment (1) that the Town of Beech Mountain Ordinance § 93.21(F) was unconstitutional and (2) that the Ordinance was a zoning ordinance. We disagree with both contentions.

A. Declaration of the Constitutionality of the Town Ordinance

[10] The Town first claims the declaratory judgment that the Ordinance was unconstitutional was in error because the Town's amendment of the Buckeye Lake Protection Ordinance and corresponding removal of § 93.21(F), the specifically challenged provision, rendered the request for a declaratory judgment moot. The Town argues that the amendment eliminated the trial court's subject matter jurisdiction to enter such an order. We do not agree.

"The purpose of the Declaratory Judgment Act is, 'to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations[,]' [and] is to be liberally construed and administered." *Nationwide Mut. Ins. Co. v. Robert*s, 261 N.C. 285, 287, 134 S.E.2d 654, 657 (1964) (quoting *Walker v. Phelps*, 202 N.C. 344, 349, 162 S.E. 727, 729 (1932)). It is well settled that "[t]he Superior Court has jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a[n] . . . ordinance . . . ." *Id.*, 134 S.E.2d at 656-57. As a general matter, our Supreme Court has acknowledged that "[o]nce the jurisdiction of a court . . . attaches, . . . it will not be ousted by subsequent events." *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978).

The Town points out that "[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *Id.* at 147, 250 S.E.2d at 912. Such is not the case here. Upon modification and elimination of § 93.21(F) in January 2013, Genesis had already incurred monetary damages resulting from the Town's enactment and enforcement of the Ordinance. Thus, the January 2013 modification of the Buckeye Lake Protection Ordinance and the elimination of § 93.21(F) did not provide Genesis with the relief it sought and did not alter the fact that the Ordinance was unconstitutional as applied to Genesis prior to its amendment.

In arguing the issue was moot, the Town also relies on *State v. McCluney*, 280 N.C. 404, 407, 185 S.E.2d 870, 872 (1972), which holds that "repeal of [a statute] renders moot the question of its constitutionality . . . ." However, that principle does not apply here as the Supreme Court has specifically limited the application of this rule to criminal statutes. *Id.* We also find that the Town's reliance on *City of Raleigh v. Norfolk S. Ry. Co.*, 275 N.C. 454, 464, 168 S.E.2d 389, 396 (1969), is misplaced because, as the Supreme Court acknowledged, "[t]he very crux of [that] appeal lies in the construction of a *proposed* ordinance which the city *has not enacted*. . . . [Thus,] [n]o wrong has resulted to either party . . . ." (Second emphasis added.) Because § 93.21(F) was enacted, *City of Raleigh* is inapplicable to this dispute.

Here, the Town enacted § 93.21(F) of the Buckeye Lake Ordinance and enforced it against Genesis before the Ordinance was later amended and § 93.21(F) revised. The jury found that this section of the Ordinance, as originally applied to Genesis, resulted in a violation of Genesis' substantive due process rights at the time it was adopted and enforced. Therefore, pursuant to *Roberts*, 261 N.C. at 287, 134 S.E.2d at 656, the Ordinance presented a "genuine controversy between" Genesis and the Town, and the trial court had the requisite jurisdiction to declare § 93.21(F) unconstitutional as applied to Genesis.

B. Declaration of the Ordinance as a "Zoning" Ordinance

[11] The Town next claims that the trial court's declaration that § 93.21(F) is a "zoning" ordinance adopted pursuant to N.C. Gen. Stat. § 160A-381(a) (2015), as opposed to an ordinance derived from the Town's police power pursuant to N.C. Gen. Stat. § 160A-174 (2015), was in error. The Town argues that the Ordinance "cannot be classified as a zoning ordinance because [the] Ordinance simply does not 'zone', but instead, seeks to prevent adverse effects on public water supply quality." We do not agree.

N.C. Gen. Stat. § 160A-381(a) states:

> For the purpose of promoting health, safety, morals, or the general welfare of the community, any city may adopt zoning and development regulation ordinances. These ordinances may be adopted as part of a unified development ordinance *or as a separate ordinance. A zoning ordinance may regulate and restrict . . . the location and use of buildings, structures and land.*

(Emphasis added).

"Zoning laws, when valid, *are an exercise of the police power* of the sovereign reasonably to regulate or restrict the use of private property . . . ." *Zopfi v. City of Wilmington*, 273 N.C. 430, 433, 160 S.E.2d 325, 330 (1968) (emphasis added). This general concept, and the plain language of N.C. Gen. Stat. § 160A-381(a) undercut the Town's argument that any ordinance adopted for the purpose of preventing adverse effects on the public water supply, pursuant to the Town's police power, cannot be a zoning ordinance. Zoning ordinances are specifically adopted for the promotion of the health and general welfare of the community.

Lastly, it is evident that our Supreme Court has traditionally considered "buffer" ordinances, such as the one at issue here, zoning ordinances. *See*, *e.g.*, *Armstrong v. McInnis*, 264 N.C. 616, 629, 142 S.E.2d 670, 679 (1965). Because the Town cites no case law supporting its argument that we invalidate the trial court's declaration of the Buckeye Lake Protection Ordinance as a zoning ordinance, and because we find the purpose and scope of the Ordinance to be in accord with N.C. Gen. Stat. § 160A-381(a), we find no error.

Conclusion

In conclusion, we affirm the trial court's grant of summary judgment to Genesis on the Town's breach of lease claim. Further, we hold that the trial court did not err in denying the Town's motions for directed verdict and JNOV on Genesis' substantive due process counterclaim. We also hold that the Town has failed to demonstrate that the trial court erred in denying its motion for a new trial or amended verdict. Finally, we hold that trial court properly entered its declaratory judgments.

AFFIRMED AS TO COA15-260; NO ERROR AS TO COA15-517.

Judge HUNTER, JR. concurs.

Judge DILLON dissents in a separate opinion.

DILLON, Judge, dissenting.

I believe that the trial court erred in denying the Town's motions for directed verdict and JNOV regarding Genesis' substantive due process claim. Further, I believe that the trial court erred in granting summary judgment in favor of Genesis on the Town's breach of Lease claim. Accordingly, I respectfully dissent.

I. Genesis' Substantive Due Process Claim

In 1999, the Town entered into an agreement (the "Lease") to lease to Genesis certain property (the "Property") in close proximity to Buckeye Lake. Buckeye Lake is the source of the Town's drinking water. Genesis uses the property to maintain a wildlife refuge.

In 2009, the Town enacted an ordinance (the "Ordinance") prohibiting the housing of animals within 200 feet of Buckeye Lake or of any stream that drains into Buckeye Lake. This Ordinance severely affects Genesis' ability to operate its wildlife refuge on the Property. There is evidence that some Town officials were motivated in passing the Ordinance by a desire of forcing Genesis to move its operation to another site.

I believe that the Town's enactment of the Ordinance *may* give rise to certain causes of action in favor of Genesis, e.g., an inverse condemnation claim[1] and a breach of contract claim for breach of Lease's implied covenant of good faith and fair dealing[2]. However, I do not believe that the Town's passage of the Ordinance gives rise to a substantive due process claim; and the trial court should have granted the Town's motions for directed verdict and JNOV on these claims.

Here, Genesis' substantive due process claim must fail, whether the challenge is *facial* or *as applied* in nature. *See Richardson v. Township of Brady*, 218 F.3d 508, 513 (6th Cir. 2000). ("A zoning ordinance may be challenged as violative of substantive due process either on its face or as applied to a particular parcel of land"). The difference between a *facial* challenge and an *as applied* challenge is as follows:

> When one makes a "facial" challenge, he or she argues that *any* application of the ordinance is unconstitutional. He or she must show that, on its face, the ordinance is arbitrary, capricious, or not rationally related to a legitimate government interest.

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1. *See, e.g., Naegele Outdoor Advertising v. City of Winston-Salem*, 340 N.C. 349, 350-51, 457 S.E.2d 874, 874-75 (1995) (recognizing inverse condemnation claim based on regulatory taking occasioned by the passing of an ordinance).

2. *See Smith v. State*, 289 N.C. 303, 322, 222 S.E.2d 412, 425 (1976) (holding that government entity waives immunity from breach of contract claims when it enters into a contract). *See also Bicycle Transit Authority v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (holding that"[i]n every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement").

> When one makes an "as applied" challenge, he or she is attacking only the decision that applied the ordinance to his or her property, not the ordinance in general. In this context, he or she must show that the government action complained of (i.e. denying a permit application) is "truly irrational." (Citing an Eleventh Circuit decision.)

WMX Techs. v. Gasconade County, 105 F.3d 1195, 1198 (8th Cir. 1997).

First, the Ordinance is *facially* valid. That is, it satisfies the rational basis test. Under the rational basis test, a challenged law is upheld "as long as there could be some rational basis for enacting [it]," *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 15 (2004), that is, that "the law in question is rationally related to a legitimate government purpose." *Standley v. Town of Woodfin*, 362 N.C. 328, 332, 661 S.E.2d 728, 731 (2008).

It is certainly a core function of a municipal government to enact ordinances for the protection of the public water supply[3]. In carrying out this function, it is rational for a municipality to enact ordinances which seeks to protect the public water supply from animal waste contamination[4]. An ordinance which prohibits the housing of animals within a certain distance from the public water supply is an ordinance rationally tailored to protect the water supply from animal waste contamination. And the fact that an ordinance does not address every threat to water contamination at Buckeye Lake does not render the ordinance unconstitutional. *Adams v. N.C. Dep't. of Natural & Econ. Res.*, 295 N.C. 683, 693, 249 S.E.2d 402, 408 (1978) (holding that "[t]here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied").

In the present case, it seems beyond question that the Town's passage of the Ordinance clears the low "rational basis test" hurdle. *See Rhyne*, 358 N.C. at 181, 591 S.E.2d at 16 (recognizing that "the rational basis test is the lowest tier of review, requiring that a connection between the [ordinance] and a 'conceivable' or 'any' [citations omitted]

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3. *See Trenton v. New Jersey*, 262 U.S. 182, 185 (1923); *Falls Church v. Fairfax County*, 272 Fed. Appx. 252, 256 (4th Cir. 2008) ("the provision and regulation of a healthful public water supply is at the core of [governmental] police power"); N.C. Gen. Stat. § 160A-312(b) ("A city shall have full authority to protect and regulate [water systems]").

4. *See, e.g.*, *Craig v. County of Chatham*, 356 N.C. 40, 52, 565 S.E.2d 172, 180 (2002) (recognizing government's authority to prohibit the operation of hog farms within a certain distance from an occupied residence).

legitimate governmental interest"). Further, the fact that the Town chose *200 feet* as a buffer is not, in and of itself, particularly concerning. As the United States Supreme Court has instructed,

> [a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific.

Heller v. Doe, 509 U.S. 312, 321, 113 S. Ct. 2637, 2643 (1993) (internal marks and citations omitted). *See also Schenck v. City of Hudson*, 114 F.3d 590, 593-94 (6th Cir. 1997) ("A legislative body need not even select the best of the least restrictive method of attaining its goals so long as the means selected are rationally related to those goals") (citations omitted).

Admittedly, there is strong evidence that the Town drafted the Ordinance in a way to ensure that Genesis' operation would fall within its ambit. However, this evidence does not render the Ordinance facially invalid. The Ordinance is drafted rationally and is not limited in scope in an arbitrary or irrational way. Rather, the Ordinance sets an unambiguous buffer (200 feet) – which may not be scientific but is otherwise not irrational – and its scope is uniform: the buffer is around all of Buckeye Lake and all streams that flow into Buckeye Lake[5].

Second, I do not believe that Genesis has a valid *as applied* substantive due process claim. Specifically, there is no evidence that the Town has irrationally *applied* the Ordinance to Genesis' operation. There is no evidence that the Town has singled out or targeted Genesis *for enforcement* or that the Town is not enforcing the Ordinance to all similarly situated properties within the 200-foot buffer. *See Dunes W. Golf Club v. Town of Mt. Pleasant*, 401 S.C. 280, 301, 737 S.E.2d 601, 612 (rejecting an *as applied* substantive due process claim, holding that an ordinance which applies uniformly to all similarly situated properties is "inherently" not arbitrary). Rather, here, the action complained

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5. Had the Town *limited* the Ordinance's reach territorially to property located near the particular stream or section of Buckeye Lake where Genesis operates, perhaps then Genesis would have an actionable constitutional challenge. In such a case, though protecting the water supply from animal waste is a legitimate function of the Town, there might be no rational basis to have *singled out* the particular stream or section of the Lake where Genesis has its operation. Here, though, the Ordinance is not so limited, but rather applies generally to all properties near the Lake and streams supplying the public water.

of consists merely of the Town enforcing a facially-valid Ordinance exactly as it is written against one who is acting in clear violation of the Ordinance's language. *See also Rogin v. Bensalem Township*, 616 F.2d 680, 689 (3rd Cir. 1980) (stating that the test in an *as applied* challenge is whether it was "irrational" for the town to apply the ordinance to a specific lot).

The fact that the Town may have had Genesis in mind in drafting the Ordinance does not give rise to an *as applied* challenge, where there is no evidence that the Town is not enforcing the ordinance uniformly. Governmental bodies routinely enact regulations to address some activity already occurring within their jurisdiction.[6] But the passage of a generally-applicable regulation does not give rise to a substantive due process claim by the party whose activity may have motivated the municipality to act, as long as the regulation is rationally tailored to address a legitimate concern, *see Turner Broad. Sys. v. FCC*, 512 U.S. 622, 652, 114 S. Ct. 2445, 2464 (1994) (stating that a Court will generally concern itself with some "alleged illicit legislative motive" where there is otherwise a conceivable rational motive), and the law is rationally applied to the lot in question, *see WMX Techs.*, *supra*.[7]

In sum, the Ordinance on its face is not arbitrary in a constitutional sense, notwithstanding evidence that the Town drafted the Ordinance with Genesis in mind. *See United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter"). There is a rational basis for the Ordinance. Further, the Ordinance has not been applied arbitrarily to Genesis' operation. Rather, the buffer is unambiguous (200 feet) and applies uniformly to all property near Buckeye Lake and to all streams feeding into Buckeye Lake. Genesis may have *other* claims against the Town for the Town's action.

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6. For instance, ordinances which prohibit adult establishments in certain areas are constitutional, even if enacted with the motivation to prevent a particular establishment from operating at a particular location. *See*, *e.g.*, *D.G. Restaurant Corp. v. Myrtle Beach*, 953 F.2d 140 (1991); *Cricket Store 17 v. City of Columbia*, 97 F.Supp.3d 737 (2015) ("as applied" challenge).

7. Our Court has held that legislation which established a general buffer and size restriction for landfills was constitutional even though *the purpose* of the legislation may have been to prevent a particular company from constructing certain landfills near our coast. *Waste Industries USA v. State*, 220 N.C. App. 163, 180, 725 S.E.2d 875, 887-88 (2012) (applying rational basis test). Specifically, the Court noted that the legislation did not totally prohibit large landfills, but merely restricted where they could be built and the restrictions were rationally related to address a legitimate governmental concern. *Id.* at 180, 725 S.E.2d at 888.

However, my vote is to reverse the trial court's denial of the Town's motions for directed verdict and JNOV on Genesis' substantive due process claim.

II. Breach of Lease Summary Judgment

My vote is to reverse the trial court's grant of summary judgment in favor of Genesis on the Town's breach of Lease claim.

The Lease provides that Genesis shall not use or permit the Leased Premises to be used "for any purpose which violates any law." The majority holds that since it is not illegal to operate a wildlife refuge and education center, there is no breach of the Lease. However, I believe that the majority reads the Lease provision far too narrowly.

While I agree with the majority that the "illegal purpose" provision in the Lease prevents Genesis from engaging in activities which are illegal, e.g., operating a gambling casino, I believe that the plain reading of the provision language also allows a landlord to declare a default where the tenant *purposefully persists* in violating zoning, setback, building, or other ordinances in the use of the landlord's property. To me, it seems beyond question that a landlord can declare a default where the tenant persists in violating laws concerning how the landlord's land may be used.

Here, there is evidence that Genesis has *persisted* in violating certain ordinances regarding the maintenance of certain structures and the housing of animals on the Property. Accordingly, I believe that there is a genuine issue of material fact that Genesis has breached the Lease provision preventing Genesis from using the Property for a "purpose which violates any law."

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 10 MAY 2016)

IN RE J.S.K. No. 15-1185	Cabarrus (15JA4) (15JA5)	Affirmed
IN RE SMITH No. 15-195	Columbus (13SP121)	Reversed and Remanded
IN RE T.L.M. No. 15-894	Richmond (15JB22)	Affirmed
STATE v. GRADY No. 15-433	Wayne (11CRS51265)	No Error
STATE v. HOLDEN No. 15-460	Vance (11CRS1136)	No Error
STATE v. JOE No. 15-878	Forsyth (12CRS61062-63) (13CRS54259-61) (13CRS7165) (14CRS9)	Vacated and Remanded
STATE v. KNIGHT No. 15-917	New Hanover (14CRS52925)	No Error
STATE v. LOPEZ No. 15-1072	Cabarrus (13CRS50796-97)	No Error
STATE v. PERRY No. 15-836	Mecklenburg (11CRS255017-18)	No Error
STATE v. WALLACE No. 15-783	Iredell (12CRS1423) (12CRS50902-03)	No Error
STATE v. WATERS No. 15-645	Iredell (06CRS57322) (06CRS57375) (06CRS58899) (06CRS60631-36) (14CRS2065-66)	Affirmed
U.S. BANK NAT'L ASS'N v. PINKNEY No. 15-797	Forsyth (14CVS5603)	Affirmed
UNIVERSAL CAB CO., INC. v. CITY OF CHARLOTTE No. 15-752	Mecklenburg (14CVS10914)	Affirmed

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